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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-3191, 99-1115 & 99-1516

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, THE CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 7619—Milton I. Shadur, *Judge*.

ARGUED JUNE 10, 1999—DECIDED SEPTEMBER 1, 1999

Before HARLINGTON WOOD, JR., RIPPLE and MANION, *Circuit Judges*.

RIPPLE, *Circuit Judge*. The Federation of Advertising Industry Representatives ("the Federation") brought this action seeking declaratory and injunctive relief against a City of Chicago ordinance that restricts public advertisement of cigarette and alcohol products ("the Ordinance"). In its complaint, the Federation submitted that the Ordinance violated the First Amendment, the Contracts Clause and the Due Process Clause of the Constitution of the United States. It also alleged that the Ordinance was preempted by the Federal Cigarette Labeling and Advertising Act ("the FCLAA" or "the Act") and by state law. The district court held that the Ordinance is preempted by the FCLAA. For the reasons stated in this opinion, we affirm in part and reverse in part the judgment of the district court and remand for further proceedings consistent with this opinion.

I

BACKGROUND

Chicago adopted an ordinance restricting public advertisement of cigarette products and alcohol. The Ordinance essentially bans all publicly visible advertising of such products, and then carves out certain exceptions. For example, the Ordinance exempts signs located near highways, in certain commercial and manufacturing zoning areas, at certain sports facilities and inside stores licensed to sell alcohol and cigarette products. The Ordinance permits signs on commercial vehicles transporting such products, and signs identifying the premises where such products are sold.[1]

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[1] The text of the Ordinance states:

> (a) No person may place any sign, poster, placard or graphic display that advertises cigarettes or alcoholic beverages in a publicly visible location. In this section, "publicly visible location" includes outdoor billboards, sides of buildings, and free-standing signboards. This section shall not apply to:

(footnote continued)

The Federation submits that the Ordinance is preempted by § 5(b) of the FCLAA:

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1. (A) With respect to cigarettes, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-64 of this code; or (B) With respect to alcoholic beverages, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-60 of this code; or (C) On commercial vehicles used for transporting cigarettes or alcoholic beverages;

2. (A) With respect to cigarettes, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-64 of this code that has been placed for the purpose of identifying such premises; or (B) With respect to alcoholic beverages, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-60 of this code that has been placed for the purpose of identifying such premises;

3. Any sign that contains a generic description of cigarettes or alcoholic beverages;

4. (A) With respect to cigarettes, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-64 of this code that is provided as part of a promotion of a particular brand of cigarettes; or (B) With respect to alcoholic beverages, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-60 of this code that is provided as part of a promotion of a particular brand of alcoholic beverage;

5. Any sign at a special event, as that term is defined in section 10-8-335 of this code;

6. Any sign on a CTA vehicle;

7. Any sign on property owned, leased or operated by the Illinois Sports Facilities Authority;

8. Any sign at Comiskey Park, Soldier Field, the United Center, or Wrigley Field;

9. Any sign on property adjacent to an interstate highway; or

10. Any sign located in a C3 District (Commercial-Manufacturing), a C4 District (Motor Freight Terminal), or any M District (Manufacturing).

(footnote continued)

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

Congress enacted the initial version of the FCLAA in 1965. That version required conspicuous labels warning of smoking's health risks on every package of cigarettes sold in the United States. The original preemption provision of the Act stated:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334 (1965). The current version of § 5(b) was adopted in 1969. Congress then made substantial revisions to the FCLAA. In addition to amending the preemption provision, the 1969 Amendment strengthened the required warning label and banned cigarette advertising in any electronic medium subject to regulation by the Federal Communications Commission.

The district court held that the plain language of § 5(b) of the 1969 Act applied to preempt the Ordinance's cigarette advertising restrictions. *See Federation of Adver. Indus. Representatives v. City of Chicago*, 12 F. Supp.2d 844, 848 (N.D. Ill. 1998). The court also held that the regulation of alcohol advertising was not severable from the preempted regulation of cigarette advertising.

(b) This section shall not be construed to permit any display that is otherwise restricted or prohibited by law.

(c) The penalty for violation of this section shall be as set forth in section 11.13 of this Title.

R.1, Ex.A.

II

DISCUSSION

A.

Our interpretation of § 5(b) must begin with the Supreme Court's interpretation of that provision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). In *Cipollone*, the Court set out a general framework for addressing preemption involving § 5(b). Although a majority of the Court did not join all aspects of the lead opinion, a majority of the Court did agree that, in analyzing a preemption issue, we must " 'start[ ] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' Accordingly, '[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." *Id.* at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (internal quotation marks omitted)). In Cipollone, the Court applied these principles in determining whether various common law claims against cigarette manufacturers had been preempted by the federal Act. Here, we are confronted with a different issue. We must determine whether the language applying preemption to those state laws that regulate "with respect to advertising and promotion" preempts the Ordinance. The holding of the Court in *Cipollone* does not, of course, resolve this precise issue. The Court's analysis, however, does provide valuable insight.

The 1969 Amendment broadened the scope of the FCLAA's preemption and, in certain cases, the broader language indicates greater preemption under the 1969 Act than under the 1965 Act. *See Cipollone*, 505 U.S. at 520. Nevertheless, as a unanimous Supreme Court has cautioned in a similar preemption context, *see New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S.

645, 656 (1995), we must be careful not to adopt an "uncritical literalism" in approaching this difficult issue. Instead, we must follow the instruction of the Supreme Court that "any understanding of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.' " *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (quoting *Cipollone*, 505 U.S. at 530 n.27) (emphasis in original).[2] In *Travelers Insurance*, the Court considered § 514 of the Employee Retirement Income Security Act ("ERISA"). A unanimous opinion of the Court stated:

> The governing text of ERISA is clearly expansive. Section 514(a) marks for pre-emption "all state laws insofar as they . . . relate to any employee benefit plan" covered by ERISA, and one might be excused for wondering, at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," H. James, Roderick Hudson xli (New York ed., World's Classics 1960). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. . . . We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

Travelers Ins., 514 U.S. at 655-56.

The limiting language of the FCLAA at issue here ("with respect to advertising and promotion") is similar in its breadth

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[2] Although the lead opinion in *Medtronic* did not carry a majority of the Court, a majority of the Court did agree with the general principles at issue here.

to the language of ERISA § 514 ("relate to any employee benefits plan"). *See Vango Media, Inc. v. City of New York*, 34 F.3d 68, 74 (2d Cir. 1994). Despite the obvious difference in the statutes, the methodology set out in *Travelers Insurance* is helpful in interpreting the language of the FCLAA at issue here. If the FCLAA language ("with respect to advertising and promotion") were viewed with an "uncritical literalism," the effect would be to "read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Travelers Ins.*, 514 U.S. at 656.

Following the Supreme Court's mandate in *Travelers Insurance* and in *Medtronic*, we must examine the congressional scheme and legislative history of § 5(b) in order to determine what Congress meant by this broad language. *See id.* (interpreting "relate to" under ERISA § 514 in accordance with the congressional goal of uniformity under ERISA); *Medtronic*, 518 U.S. at 484-85. In *Cipollone*, the Court stated that "the pre-preemptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." 505 U.S. at 517. Notably, however, every opinion in *Cipollone* nevertheless relied on legislative history, historical context, legislative purpose, or analysis of the statutory provisions as a whole in interpreting the scope of the pre-emption mandated by the language of § 5(b) of the 1969 Act. *See id.* at 513-15, 519-20, 529 (plurality opinion); *id.* at 534-35, 539-42 (Blackmun, J., concurring in part and dissenting in part); id. at 553 (Scalia, J., concurring in part and dissenting in part). Indeed, in *Medtronic*, a majority of the Court took pains to clarify what it meant in *Cipollone*:

> As in *Cipollone*, we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of [the statute at issue in *Medtronic*] means that we need not go beyond that language to determine whether Congress intended the [statute] to pre-empt at least some state law, we must nonetheless "identify the domain expressly pre-empted"

> by that language. Although our analysis of the scope of the pre-emption statute must begin with its text, our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption.

Medtronic, 518 U.S. at 484-85 (quoting *Cipollone*, 505 U.S. at 517) (citations omitted). The Court went on to discuss those two presumptions. First, it noted that, "because the States are independent sovereigns in our federal system," there has long been a presumption that "Congress does not cavalierly pre-empt state-law causes of action." *Id.* at 485. This presumption, remarked the Court, is especially applicable when Congress legislates in areas traditionally occupied by the historic police powers of the state. Second, continued the Court, in determining whether Congress has preempted such activity, the purpose of Congress must, in every case, be "the ultimate touchstone." *Id.* (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). That intent is discerned, continued the Court, from the language of the Act, the statutory framework and the structure and purpose of the Act as a whole. *See id.* at 486. In light of the Supreme Court's clear mandate, we cannot limit our analysis solely to the language of § 5(b). Indeed, the only other circuit to confront whether the FCLAA preempts a similar ordinance has heeded the Supreme Court's words and adopted the methodology set forth in the Court's opinions. *See Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1030 (1996), *readopted*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

Any other approach leads to results that we cannot believe Congress intended.[3] We cannot imagine that Congress

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[3] We need not hypothesize such results; adherence to a more rigid approach already has produced them. One court has held that the FCLAA prevents states and municipalities from restricting both advertisements of cigarettes near schools and distributions of free cigarette samples. *See Rockwood v. City of Burlington*, 21 F. Supp.2d 411, 420 (D. Vt. 1998).

intended the states to be without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard. However, failure to remember that Congress was concerned about the states' capacity to utilize their traditional police powers on matters that do not tread on federal interests inevitably will lead to such results. We can expect Congress to be far more explicit if it intends to dilute this residual authority of the states.

When we examine the FCLAA in light of congressional goals, we encounter two important manifestations of congressional intent that shed light on the scope of § 5(b) preemption in this case. The first does not require that we leave the text of the statute. Congress set forth, in the statutory text, an express statement of the purpose of the FCLAA and its preemptive provisions:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) *not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.*

15 U.S.C. § 1331 (emphasis added). Moreover, the legislative history confirms that the preemption provision was adopted "to avoid the chaos created by multiplicity of conflicting regulations." S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663.

The second indication of the congressional intent confirms the message of this statutory text by indicating that Congress, in enacting the statute, was aware of the presumption against preemption and concerned about preserving areas of traditional local concern. The Senate Report refers to § 5(b) as "narrowly phrased" and not intended to touch state authority over sales to minors, taxation, indoor smoking, or "similar police regulations." S. Rep. No. 566, 91st Cong., 2d Sess. (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. We therefore must read the language of the FCLAA preemption provision in light of Congress' desire not only to ensure uniformity of regulation with respect to matters of labeling and advertising, but also in light of the manifest congressional concern in preserving for the states the remainder of their traditional police powers.

B.

We turn then to the Ordinance to determine whether it is the type of police power regulation of local concern that Congress intended to preserve. *See* S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663. When the Ordinance is read in its entirety, it is clear that its thrust is the restriction of public advertisement of cigarettes (and alcohol products) in various locations. The Ordinance bans all public advertisement of such products, but then exempts certain sign types in certain locations. The Ordinance exempts signs located near highways, signs in certain commercial and manufacturing zoning areas, signs at certain sports facilities, signs inside a store that is licensed to sell alcohol and cigarette products, signs on commercial vehicles transporting such products, and signs identifying the premises upon which such products are sold.

Land-use and zoning issues have " 'always been an intensely local area of the law.' " *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 67 (4th Cir. 1992) (quoting Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L.

Rev. 837, 839 (1983)) (tracing the history of land-use and zoning regulations in the United States); *see also River Park, Inc. v. City of Highland Park*, 28 F.3d 164, 165, 167 (7th Cir. 1994); *Muckway v. Craft*, 789 F.2d 517, 523 (7th Cir. 1986). More specifically, it has been established for quite some time that zoning restrictions on the sizes and placement of outdoor advertisements are well within the police power of states and municipalities.[4] *See St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 274-76 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 529-31 (1917). Indeed, the Supreme Court has held that a Utah statute banning the outdoor advertisement of cigarettes is within that power. *See Packer Corp. v. Utah*, 285 U.S. 105, 108-10 (1932). The placement and manner of outdoor advertising is a matter of traditional local concern. Although Congress could choose to preempt such police regulations, it has indicated that it does not wish to do so under the FCLAA. *See Penn Advertising*, 63 F.3d at 1324; S. Rep. No. 566, 1970 U.S.C.C.A.N. at 2663. In short, considering Congress' express intent to preserve traditional areas of local concern not implicated by its desire for uniformity in advertising and labeling, we ought not imply, especially in light of the presumption against preemption, such an abrogation of a regulation of local interest and importance.

Our conclusion that this Ordinance is within the traditional local police power that Congress wished to preserve cannot end our inquiry. We still must examine the effect of the Ordinance on the federal interest in uniformity of labeling and advertising regulations. This inquiry requires that we focus on the precise sort of regulation that the Ordinance requires and determine whether compliance with the Ordinance will frustrate or burden the purpose of the federal statute. The

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[4] This authority is subject, of course, to the First Amendment protection of such signs. *See generally 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). We express no opinion with respect to the First Amendment challenge to the Ordinance, which the district court must address on remand.

Ordinance basically is a land-use regulation; it regulates the location and type of signs. In that respect, it creates no danger of interfering with the FCLAA's advertising and labeling requirements. *See Penn Advertising*, 63 F.3d at 1324.[5]

We do believe, however, that one aspect of the Ordinance is problematic in this regard. In addition to its many provisions regulating land-use, the Ordinance also purports to regulate the content of some advertising without regard to any land-use consideration. Specifically, the Ordinance permits advertising, without any location consideration, that is limited to a generic, as opposed to brand-specific, mention of a tobacco product. In our view, this provision, unlike the rest of the Ordinance, runs squarely into the prohibition of the current § 5(b), a provision that, we must remember, is substantially broader than its predecessor, which dealt solely with the specific labeling requirements.

Although we find this one aspect of the Ordinance to be preempted by federal law, we think it is clear that this aspect is severable from the rest of the Ordinance. We think it is clear that the City Council, intending to enact a broad land-use provision, would not have regarded the problematic provision as a necessary component of its handiwork. The Supreme Court of Illinois has recently noted, in considering a severability issue, that the courts have an "obligation to uphold legislative enactments whenever reasonably possible."

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[5] In this respect, the Ordinance here marks a sharp contrast with the ordinance in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). In *Vango Media*, the court considered whether an Ordinance requiring a minimum of one public health message for every four cigarette advertisements on city-licensed facilities was preempted by the FCLAA. The court held that the regulation was "with respect to advertising and promotion of cigarettes," and therefore preempted. In reaching this conclusion, the court noted that the regulation would create the nonuniformity that Congress feared. *See id.* at 74. There, unlike here, the local law would require that certain anti-smoking messages be carried in cigarette advertisements, thereby directly conflicting with the advertisement message requirements contained in the FCLAA and creating nonuniformity with those provisions.

People v. Sanders, 696 N.E.2d 1144, 1149 (Ill. 1998). That court has explained the test for severability:

> [T]his court has long held that the test of severability is whether the valid and invalid provisions of the Act are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently . . . .

Cincinnati Ins. Co. v. Chapman, 691 N.E.2d 374, 382 (Ill. 1998) (quoting *Fiorito v. Jones*, 236 N.E.2d 698 (Ill. 1968)) (internal quotation marks omitted). We believe that it is "reasonably possible" to sever the provision in question because severability would not hinder the goal of the Ordinance, which is to restrict the advertisement of cigarettes and alcohol. We cannot say that the Council would not have passed the Ordinance without this minor provision.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion. The City is entitled to its costs in this appeal.

AFFIRMED in part and
REVERSED and REMANDED in part.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 7619

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC.,

Plaintiff,

—v.—

CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION AND ORDER

This action involves a frontal attack by Federation of Advertising Industry Representatives, Inc. ("Federation"[1]) on an ordinance ("Ordinance," now Chicago Municipal Code ("Code") § 5.17) that was initially adopted by the City of Chicago ("City") on September 10, 1997 and was then amended on February 6, 1998, and that imposes substantial

[1] This shorthand designation is used in preference to Federation's acronymic self-designation "FAIR," not so much to express a value judgment about such a self-laudatory term (something that is all too common among the names that organizations seem to choose with an eye toward the acronyms that those names thus make available) as because of this Court's general preference for the use of names rather than alphabet-soup initials to refer not only to parties litigant but also to such things as legislative enactments.

prohibitions on the advertising of both cigarettes and alcohol in any "publicly visible location" (a term that is defined to include outdoor billboards, sides of buildings and free-standing signboards) in major areas of Chicago. To a substantial extent Federation's arguments are constitutional in nature, but in material part Federation challenges the validity of the ordinance in the face of the statutory preemption enacted by Congress as part of the Federal Cigarette Labeling and Advertising Act ("Act," 15 U.S.C. §§ 1331-1341).

As the Act's title indicates, by its terms that statutory provision (Act § 1334, often referred to here as the "Preemption Statute") bears directly on the Ordinance's provisions regarding cigarette advertising. But as a later section of this opinion demonstrates, the ordinance's invalidity in those terms also impacts on the related prohibition of alcohol advertising. In any event, both because the constitutional arguments (both pro and con) are largely arcane and because of the long-entrenched jurisprudential principle that arguments as to constitutionality should be faced only if some less fundamental basis for disposition is unavailable,[2] this opinion will address only the federal preemption issues.

What is implicated in that respect are the meaning and applicability of this provision of the 1969 amendment to the Act—the Preemption Statute, found at Act § 1334(b):

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

---

[2] See Justice Brandeis' famous concurrence in *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936), which is still regularly invoked by Supreme Court Justices both in majority opinions (see, e.g., *United States v. National Treasury Employees Union*, 513 U.S. 454, 478 (1995)) and in concurring opinions (see, e.g., *Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1021 (1998)), to say nothing of dissenting opinions urging that a Court majority should not have reached some constitutional issue.

In its original form that provision had created a much narrower scope of preemption, which was focused only on forbidding any variants (whether federal, state or local) on the federally-prescribed legend to be placed on cigarette packages:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[3]

But when in 1969 Congress strengthened the package warning label by shifting from a statement that cigarette smoking "may be hazardous" to the stronger statement that it "is dangerous," Congress not only broadened the preemptive force of the federal legislation but it did so in the less pinpointed language that has first been quoted in this paragraph.

It should be emphasized that this Court holds no brief for smoking as a habit, nor does it any way minimize the enormous costs in health (or, to be even more plain, in deaths) that are annually sustained because of smoking. In accordance with what it would guess probably represents the views of the vast majority of Americans, this Court has been appalled by recent revelations about what is reported to be a level of total callousness on the part of the tobacco industry—an industry that, if those revelations are true, was fully aware that the old pejorative label of "coffin nails" was literally as well as figuratively an accurate description of cigarettes, and yet the industry deliberately concealed that knowledge to maintain and increase its profits.

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[3] [Footnote by this Court] Both that original version and the current version of Act § 1334(b) were and are an accompaniment to the still-existing preemption provision of Act § 1334(a), which proscribes any statement on cigarette packages other than the warning prescribed by Congress:

> No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

But the ruling that is set out hereafter is *not* a function of the desirability or undesirability of permitting either cigarette billboard advertising or the cigarette industry's encouragement of smoking by minors. After all, this Court's role is not a legislative one, in which it is free to formulate or implement social policy by its pronouncements. Instead this Court is called upon to determine whether Congress intended to leave open to local governments such as City the ability to prohibit cigarette advertising based on health concerns, an area that Congress has chosen to occupy in part by requiring strong warnings on cigarette packages, but in which area Congress has *not* chosen (as it might have) to impose a universal prohibition or partial prohibition of billboard advertising because of health concerns—or, with Congress not having chosen to take that route, in which it has also *not* chosen instead to announce legislatively that state and local governments have a continuing power to prohibit billboard advertising on health-related grounds.

In terms of the appropriate construction and application of the Preemption Statute, all three of the submitters[4] seek to rely on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a reliance that is scarcely surprising in view of that decision's having considered the very preemption provision that is implicated here. But *Cipollone* really does not mark out a path for resolution of the issue posed in this case. Not only did *Cipollone* address the preemption or nonpreemption of state-based activities in a very different context (the area of state common law claims based on the use of tobacco), but also Parts V and VI of Justice Stevens' *Cipollone* opinion (which might have held the greatest promise for casting light on the quite different questions involved here, at least in the language of the discussion if not via the actual decision) did not command a majority of the Court. Instead the Stevens

[4] On July 28 this Court granted the last-minute motion of the United States for leave to file a brief amicus curiae, in which it supports City's position. That brief is addressed—albeit briefly (an aside for fans of Tom Swifties)—in the Appendix to this opinion.

opinion carried a plurality of four Justices, and it is not at all clear from the three-Justice partial concurrence and partial dissent authored by Justice Blackmun or from the two-Justice partial concurrence in the judgment and partial dissent authored by Justice Scalia just what might be considered as the *Court's* views on the problem that is presented here.

What *Cipollone* does teach, however—found in the earlier portion of Justice Stevens' opinion in which he speaks for the Court—provides a valuable springboard for further analysis. To begin with, *Cipollone*, 505 U.S. at 517 (citations omitted) taught that the Act's preemptive scope was to be measured *entirely* by the express language in Act § 1334, without reference to any notions of implied preemption stemming from the substantive provisions of the legislation:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act [Act § 1334]. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn.

And next, *Cipollone*, *id.* at 518-19 expressly stated that the precise and narrow 1965 version of Act § 1334(b)—concededly very different from the 1969 version now at issue—did

no more than to preempt state (as well as federal) rulemaking bodies from imposing *labeling* requirements other than those prescribed by Congress.

With that background, it is time to look at the prohibitions that are set out in the Ordinance, which must be examined in light of the broader 1969 version of the Preemption Statute that is still in place today. Here is Code § 5.17 as enacted, immediately following the Ordinance's recital of fully 10 "Whereas" clauses that the City Council has specified as the basis supporting that enactment:

> (a) No person may place any sign, poster, placard or graphic display that advertises cigarettes or alcoholic beverages in a publicly visible location. In this section, "publicly visible location" includes outdoor billboards, sides of buildings, and freestanding signboards. This section shall not apply to:
>
> 1. (A) With respect to cigarettes, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-64 of this code; or (B) With respect to alcoholic beverages, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-60 of this code; or (C) On commercial vehicles used for transporting cigarettes or alcoholic beverages;
>
> 2. (A) With respect to cigarettes, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-64 of this code that has been placed for the purpose of identifying such premises; or (B) With respect to alcoholic beverages, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-60 of this code that has been placed for the purpose of identifying such premises;
>
> 3. Any sign that contains a generic description of cigarettes or alcoholic beverages;

4. (A) With respect to cigarettes, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-64 of this code that is provided as part of a promotion of a particular brand of cigarettes; or (B) With respect to alcoholic beverages, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-60 of this code that is provided as part of a promotion of a particular brand of alcoholic beverage;

5. Any sign at a special event, as that term is defined in section 10-8-335 of this code;

6. Any sign on a CTA vehicle;

7. Any sign on property owned, leased or operated by the Illinois Sports Facilities Authority;

8. Any sign at Comiskey Park, Soldier Field, the United Center, or Wrigley Field;

9. Any sign on property adjacent to an interstate highway; or

10. Any sign located in a C3 District (Commercial-Manufacturing), a C4 District (Motor Freight Terminal), or any M District (Manufacturing).

(b) This section shall not be construed to permit any display that is otherwise restricted or prohibited by law.

(c) The penalty for violation of this section shall be as set forth in section 11.13 of this Title.[5]

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[5] [Footnote by this Court] Originally Ordinance § 2 contained a provision that made the new enactment applicable only to, "or interpreted to have an effect on," any contract executed after the Ordinance's effective date and any renewal of a preexisting contract that began after the effective date. Because Ordinance § 3 specified that it would take effect 30 days after its passage and publication, the City Council then became concerned that too many actions that might have been taken during that 30-day period could have gutted the effectiveness of the Ordinance. Accordingly, on February 6, 1998 the City Council amended the Ordi-

And now at last to the task at hand. City seeks to place heavy reliance on the Fourth Circuit's decision in *Penn Advertising of Baltimore, Inc. v. Mayor & City Council of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995), vacated and remanded 518 U.S. 1030 (1996) for further consideration in light of 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1986), and then readopted (101 F.3d 332 (4th Cir. 1996)) as modified by the contemporaneously-issued opinion in *Anheuser Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996). *Penn Advertising* rejected the claimed preemption by the Act of a Baltimore ordinance (on which Chicago has modeled its own Ordinance) on a basis stated succinctly in these terms, 63 F.3d at 324 (emphasis in original):

> Applying the methodology described in *Cipollone* to Ordinance 307, we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*.

Two things make that ruling unpersuasive here. For one thing, the Second Circuit in *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 72-74 (2d Cir. 1994) has taken a much more

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nance by sharply limiting any such grandfather clause, eliminating the earlier version of Ordinance § 2 and substituting instead:

> This ordinance shall take effect upon its passage and approval. Provided, however, that no affected sign, poster, placard or graphic display that was in place in a publicly visible location before January 31, 1998, need be removed pursuant to this ordinance for 180 days from the effective date of this ordinance. Provided further, that no replacement, alteration or substitution of an affected sign, poster, placard or graphic display shall be permitted during said 180-day period.

Federation launches a separate attack on the constitutionality of that amendatory provision, but given the nature of this opinion that constitutional issue is another question that need not be resolved here.

analytical and reasoned approach to the reading of the Preemption Statute than the sort of ipse dixit statement just quoted from *Penn Advertising* (which it will be noted begins by contrasting two concepts—"location" versus "content"—that are found nowhere in the congressional language of the Preemption Statute). And second and more important, the ensuing discussion in this opinion explains that the very nature and origin of Chicago's Ordinance bring it squarely within the literal coverage of the Preemption Statute, leaving no room for a reading that deviates from that coverage.

There is of course no question that the Ordinance contains a "prohibition," so that it clearly conforms to one component of the Preemption Statute. Nor is there any question that the Ordinance's "prohibition" is "with respect to the advertising or promotion of cigarettes," so that it equally clearly conforms to another of the Preemption Statute's essential requirements. Where the parties part company is on the sole remaining question: whether, in the language of the Preemption Statute, the prohibition is "based on smoking and health."

Taking a leaf[6] from the pages of *Penn Advertising*, City begins its argument on that score by emphasizing that the Ordinance "regulates only the location, not the content, of tobacco billboards" (City Mem. 2). That position of course ignores the express provision of the Preemption Statute that outlaws not only (1) any state law "*requirement* . . . based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes" but also (2) any "*prohibition* based on smoking and health. . .with respect to the advertising or promotion of . . . cigarettes." To be sure, a "requirement . . . with respect to the advertising or promotion of . . . cigarettes" may well consist of a regulation of advertising *content* (for example, the same kind of state-dictated or locally-dictated delivery of information that was the sole subject of the original 1965 version of the Preemption Statute, or

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6 A tobacco leaf?

that was the subject of the ordinance at issue in *Vango Media*). But by contrast, a "prohibition . . . with respect to advertising . . . of cigarettes" denotes a flat-out *bar* of such advertising—and if such a bar in terms of location is indeed "based on smoking and health," it is still specifically forbidden by the express terms of the Preemption Statute. Hence what City has sought to pose in that respect by setting off "location" against "content" is really based on a false dichotomy that is not found in the Preemption Statute itself.

But the main string that City seeks to affix to its bow—the argument to which it devotes fully 17 of the 29-plus pages of its memorandum that relate to the cigarette portion of the Ordinance (running from the middle of page 15 to the top of page 32, with all other arguments spanning only from the bottom two lines on page 2 to the middle of page 15)—is the one that bears this heading (City Mem. 15):

> III. The Purpose of the Ordinance is to Promote State Laws Making It Illegal for Minors to Purchase or Be Sold Cigarettes

This time City seeks to create a mutually exclusive universe comprising two elements: one, an ordinance prohibition that is "based on smoking and health," which would concededly run afoul of the Preemption Statute, and the other an ordinance prohibition that is aimed at preventing the *illegal* purchases of cigarettes by, and sales of cigarettes to, minors—things that constitute a preexisting illegality under both 720 ILCS 675/1 § 4-64-200. To facilitate a full understanding of City's arguments in that respect, without running any risk of mischaracterization that would be involved in a paraphrase, here is how City's Mem. 15-16 summarizes its many pages of argument that follow:

> Even if the FCLAA [the Act] were interpreted to preempt regulations governing the mere placement of cigarette advertising and this interpretation were found to be constitutional, the Ordinance still would not be pre-

empted because it is not "based on smoking and health." Rather, the purpose of the Ordinance is to effectuate state and local laws making it illegal for persons under the age of 18 to purchase or be sold cigarettes.

The Ordinance explicitly states that its purpose is to reduce illegal transactions—i.e., cigarette sales to or purchases by minors. Furthermore, the preamble is focused on illegal transactions, not health, and on the connection between outdoor advertising and illegal activities. Indeed, the very first sentence of the Ordinance recites that it is unlawful for any individual under the age of 18 to purchase or be sold cigarettes. All of the recitals, or "whereas" clauses, deal with the illegality of cigarette sales to or purchases by minors, the degree of cigarette consumption by minors, the extent of outdoor advertising of cigarettes, the unique nature of cigarette billboards, the relationship between advertising of cigarettes and consumption of cigarettes, and the need for the Ordinance. Nothing in the recitals indicates that the purpose of the Ordinance, vis-a-vis cigarettes, is anything other than preventing illegal transactions.

In thus attempting to separate the prevention of illegal transactions from the Preemption Statute's provision that bars any "prohibition based on smoking and health" with respect to cigarette advertising, City seeks to downplay a few of the "Whereas" clauses that precede the ordinance itself—a clause that contains references to articles in scientific journals that Federation (for its part) portrays as bearing heavily on the effects of smoking on health, as well as a clause that begins "Studies have shown that our nation's adolescents commonly use cigarettes, and that cigarettes constitute a 'gateway' drug for these youth, i.e., a substance which is used by adolescents as a first drug and opens the door for use of other 'harder' substances at a later date." And in a further effort to buttress that second dichotomy, which seeks to lay stress on the hoped-for reduction of illegal transactions (cigarette sales to

or purchases by minors) as assertedly unrelated to "smoking and health." City similarly denigrates Federation's efforts (Federation Preemption Mem. 7-16) to point (1) to the already referred-to portions of the "Whereas" preambles, (2) to statements of various aldermen in the course of the hearings on the Ordinance that linked its purposes to health concerns and (3) to documents contained in the legislative record that reflect the same linkage.

But all of those efforts turn out (to make a bad pun) to be nothing more than a smoke screen. What instead proves to be fatal to City's case is that the entire structure of its argument, erected as it is on the supposed distinction between a stated goal of preventing illegal cigarette sales to or purchases by minors (City's characterization of the ordinance) and a goal that links "smoking and health" (and would thus come within the *express* prohibition of the Preemption Statute), collapses because it proves to be built on a foundation of quicksand—of City's outright misrepresentation of the Ordinance's underpinning.

In that regard, here is what City's Mem. 20 states as the purported justification for that supposed contrast between (1) the ordinance's several "Whereas" clauses that reiterate a concern for promoting the purpose of preventing illegal cigarette sales to or purchases by minors and (2) any linkup between "smoking and health" as a basic purpose of the Ordinance:

> First, plaintiff is incorrect about the historical basis for state laws making it illegal to sell cigarettes to minors. Such laws were originally enacted before the health risks of cigarette smoking were established. A law making it illegal for any person to "sell, buy or furnish any cigar or cigarette or tobacco in any of its forms, to any minor under sixteen years of age" was enacted in Illinois as early as 1887. *See* 1887 Ill. Laws 298 (codified at Ill. Comp. Stat. ch. 38, sec. 207h) (City's 12(n), Ex. C) . The first medical studies suggesting a connection between smoking and illness did not appear until the 1920's. *See Cipollone*, 505 U.S. at 513. Historically, such laws fall

> within a category of laws pertaining to activities that were lawful for adults, but viewed as *morally* inappropriate for children, such as gambling, acquiring pornography or purchasing alcoholic beverages. These laws might have incidentally protected the health of minors, but this was not the principal objective. *See* Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. Legis. 1, 16 (1997). Plaintiff thus has failed to show that the state law the Ordinance seeks to effectuate is itself based on health.

Not to put too fine a point on matters, that statement is simply and demonstrably false, and it has required no more than a few minutes' search by this Court to prove it.[7]

Ecclesiastes 1:9 and 1:10 had it right:

> The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun. Is there any thing whereof it may be said, See, this is new? it hath been already of old time, which was before us.

Listen to what the Illinois Supreme Court said exactly a century ago in upholding the validity of the then-existing prohibition against cigarette sales to minors (basically the same prohibition that is now in force, both in the state statute and

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[7] It is frankly astonishing for City to have made the just quoted statements in the text. Only a moment's resort by this Court to 720 ILCS 675/1, which is the current version of the 1887 Illinois statute to which City refers (the statute that was in turn the precursor of City's prior and present versions of its earlier-quoted ordinance containing like prohibitions against cigarette sales to and purchases by minors), was needed to disclose that the Illinois Supreme Court decision referred to in the next paragraph of the text is the *only* case cited as an annotation to that statute. This Court does not of course suggest that City's counsel intentionally suppressed any reference to that vitally important decision—rather the omission of any mention of that decision, when coupled with City's Memorandum's flatly incorrect portrayal just quoted in the text, has to reflect seriously (indeed, fatally) inadequate research on counsel's part.

in the Code, but with such minor changes as increasing the age of the prohibition from 16 years to 18 years). Here is *Gundling v. City of Chicago*, 176 Ill. 340, 347-49, 52 N.E. 44, 45-46 (1898), which is quoted at length because of its obvious and compelling significance to the present dispute:

> The measure has relation to the public health, and is required in that interest. With this object evidently in view, the legislature passed an act, approved June 15, 1887, in force July 1, 1887, entitled "An act to prohibit selling, giving or furnishing tobacco, in any of its forms, to minors, and providing a penalty therefor." Section 1 of said act provides: "That hereafter no person or persons in this state shall sell, buy for or furnish any cigar or cigarette, or tobacco in any of its forms, to any minor under sixteen years of age, unless upon the written order of parent or guardian." Section 2 provides that, if any person or persons shall violate the provisions of Section 1, he, she, or they shall, on conviction thereof, forfeit and pay for each offense the sum of $20. The object and purpose of this enactment were to subserve and protect the health and welfare of the class of persons to whom the act refers, and to whom a sale is forbidden. The consensus of opinion in reference to the use of cigarettes is that they are injurious to the young with immature minds, and common observation causes us to know that tobacco in the form of cigarettes is more largely used by those of young and immature minds than by any other class.
>
> It is urged by appellant that the city council has no right to single out a particular form of manufactured tobacco, and provide for its regulation, and require a license for its sale, without making the requirement apply to all the forms in which tobacco may be used. It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly

provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that particular form of tobacco. Paragraph 66, before quoted, expressly authorizes the adoption of ordinances necessary to police power; and paragraph 78 is an express authorization of the city council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions, express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort, and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation. *Ferguson v. City of Selma*, 43 Ala. 400.

The regulation of police power is hardly susceptible of exact definition, as the exigencies of each case are varying, and the cases are innumerable where the health of the inhabitants of the municipality may be in some degree endangered. When the city council considers some occupation or thing dangerous to the health of the community, and, in the exercise of its discretion, passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent, and the consequences of neglect are more detrimental to the public good, in this than in any other form of local evil. It being clear that the public health and welfare of a large class in the community would be subserved and protected by

> ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by paragraphs 66 and 78. An ordinance of this character is not in conflict with any principle of the common law, or with any public or general statute, and infringes no private right not necessarily infringed in the interests of good government. It subserves the public welfare, protects the health of the community, and is included within the express powers granted the city council. The ordinance was not void.

Incidentally, *Gundling* was then affirmed by the United States Supreme Court (177 U.S. 183 (1900)), but as might be expected the affirmance made only brief passing reference to the essentially state law question of enacting legislation based on considerations of public health (*id.* at 188, 189).

What we have in this case, then, is an Ordinance that—placing the definitional terms of the Preemption Statute in quotation marks—is a "prohibition" of cigarette billboard "advertising" that is unquestionably "based on smoking and health." As to the latter term, the only one by which City relies to extricate itself from the Preemption Statute, on the City's own version of the matter the Ordinance is aimed at illegal sales of cigarettes to minors, and *Grundling* demonstrates beyond peradventure that *the* reason for such sales having been made illegal in the first place was the perceived threat to the health of those minors.[8] In those terms there is no

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[8] If there were any doubt on this score, based on some sleight-of-hand notion that the Ordinance's predominant focus is on illegality rather than on the health-related considerations that prompted that illegality to begin with, it would be dispelled by the Supreme Court's decision in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 106-07 (1992) (decided less than a week before *Cipollone*) that any provision that "serves several objectives rather than one" is still preempted even though fewer than all of those objectives are within the preempted

ambiguity whatever in the Preemption Statute, or in its all-fours application to the Ordinance under *Cipollone*, 505 U.S. at 517, and that spells both the beginning and the end of the statutory analysis. City is thus hoist by its own petard: It has itself demonstrated (although perhaps inadvertently, given its fundamentally flawed research) that the Ordinance is pre-empted by the Preemption Statute and that it is hence invalid as it relates to cigarette advertising.

All that remains for consideration is whether the ordinance's provisions relating to the corresponding prohibition of alcohol advertising, a prohibition that is not within the scope of the same preemption analysis, should survive despite the just-announced invalidation of the Ordinance's prohibition against cigarette advertising. That is of course a function of the Ordinance's severability or nonseverability, a question of state law (*Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam)). And although the parties are again at odds in their proposed resolution of that question, they have no quarrel as to the standards that are consistently announced and applied by the Illinois Supreme Court in that respect—see *Cincinnati Ins. Co. v. Chapman*, 181 Ill.2d 65, 81-82, 691 N.E.2d 374, 381-82 (1998) (citations omitted):

> Although we acknowledge the severability clause contained in section 55 of the Act, such a clause is not necessarily conclusive as to whether the remainder of the Act can stand. A court's authority to eliminate invalid elements of an act and yet sustain its valid provisions derives not from legislative fiat, but rather from the powers inherent in the judiciary. In fact, the practice of holding statutory provisions severable from those that are found to be invalid originated in the judiciary "long before the innovation of separability clauses." Thus, although the use of severability clauses has become a

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area. But that is simply an added and really unnecessary fillip, for any attempted distinction in those terms is really a distinction without a difference.

> "common legislative drafting practice" in "modern" times, it is "regarded as little more than a mere formality."
>
> Due to the historical background of the severability clause, courts view the clause not as "an 'inexorable command,' " but as an aid to statutory construction. Indeed, this court has long held that the test of severability is whether the valid and invalid provisions of the Act are " 'so mutually "connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently ***".' "

In this instance the ordinance itself contains no specific severability clause, unlike a whole set of other provisions of the Code that do contain such specific clauses. And given the teaching of *Cincinnati Ins.* and other cases that even a specific severability clause is "regarded as little more than a mere formality," that notion of "mere formality" clearly applies a fortiori where, as here, City points only to the general severability clause in Code § 1-4-200 (a well-established principle recently reconfirmed in *People v. Warren*, 173 Ill.2d 348, 371-72, 671 N.E.2d 700, 712 (1996)).

This Court has examined the cases cited by both sides with care. Any reader of the most recent extended pronouncements of the Illinois Supreme Court in this area (*Cincinnati Ins.*, 181 Ill.2d at 85-86, 691 N.E.2d at 383; *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 464-66, 689 N.E.2d 1057, 1103-04 (1997)) cannot help but be struck by that Court's tendency, in its search for legislative intent, to treat intricately interwoven legislative provisions such as the Ordinance—with its common focus on the prohibition of advertising and on the protection of minors, though protecting against two perceived evils—as the type of integrated whole that triggers infectious invalidity. And that approach appears especially appropriate here, where the numerous "Whereas" clauses that the City

Council has used to underpin the Ordinance either treat tobacco and alcohol as a paired entry (as is done in the text of the Ordinance) or focus almost entirely on cigarette-related considerations, picking alcohol up only as a sort of caboose attached to the cigarette train.

Accordingly this Court finds no real predicate for determining that the restraints on alcohol advertising should survive independently of those on cigarette advertising. If the City Council wishes on reconsideration of the subject of alcohol advertising as an independent matter free of any preemption problems (but also being aware of the other challenges that have been posed by Federation), it is free to do so in the future. But for now, just as in *Cincinnati Ins.* and *Best*, the invalid portions of the Ordinance cannot rationally be severed from the residue, and the entire Ordinance must fall.

Conclusion

This opinion has dealt with the subject of preemption of the Ordinance by the federal Preemption Statute, an issue brought on for resolution by Federation's motion for summary judgment on that score and City's response to that motion. Both sides have complied with the requirements of Fed. R. Civ. P. ("Rule") 56 and this District Court's implementing provisions of General Rule 12(M) and 12(N) in that respect. Because there is no genuine issue of material fact and Federation is entitled to a judgment as a matter of law, the Ordinance must be found to be invalid in its entirety.

In accordance with the prayer for relief in Federation's Complaint:

> 1. This Court declares that the Ordinance is preempted by Act § 1334(b) and is therefore null, void and of no legal effect.
>
> 2. City and all of its officers, agents, servants, employees and attorneys are permanently enjoined from enforcing the Ordinance or taking any action pursuant thereto.

That effectively provides Federation with full relief,[9] except for its unresolved prayers for attorneys' fees (an issue that does not affect the finality of this order—see *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988)) and for damages (an issue as to which Federation, although having the burden of proof, has provided no evidence in support of its motions for summary judgment, so that its prayer is denied). Accordingly this is a final order disposing of this action.

/s/ MILTON I. SHADUR
Milton I. Shadur
Senior United States District Judge

Date: July 29, 1998

[9] This opinion's determination as to preemption of course moots all of the other areas of dispute between the litigants, and that being the case, no view is expressed by this Court on the subject of the Ordinance's constitutionality or unconstitutionality.

Appendix

As n.4 reflects, this Court has granted the last-minute motion of the United States for leave to file an amicus curiae brief. Because the analysis in the text of this opinion renders the position that has been advanced by the United States a nonmaterial digression, this Appendix will deal with the United States' argument briefly and separately.

Essentially the United States contends that only it can provide an interpretation of the Preemption Statute that is entitled to *Chevron* deference (the familiar doctrine that is named after *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). And in that respect the United States points to the statement in *Auer v. Robbins*, 117 S.Ct. 905, 912 (1997) that, at least in the circumstances of that case, the deference customarily due to an agency's interpretation of a statute that it administers was not diminished by the fact that the "interpretation comes to us in the form of a legal brief" rather than in the more conventional way.

But the difficulty with that entire approach in this case is that by its own terms the *Chevron* doctrine does not come into play if the statute at issue is unambiguous in its application to the question at issue in the case. Earlier this year our Court of Appeals has reconfirmed that principle in *Bankers Life and Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998). And as the foregoing opinion has reflected at great length, the Preemption Statute unambiguously covers the Ordinance involved in this case (once, of course, the fresh air of analysis has blown away City's smoke screens that have sought to obscure the fact that the cigarette advertising prohibition in the Ordinance is indeed "based on smoking and health").

Hence the United States' amicus curiae submission adds nothing to the dialogue. What has been said in the text of the opinion stands.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Nos. 98-3191, 99-1115 & 99-1516
October 14, 1999

Before
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, THE CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 97 C 7619—Milton I. Shadur, *Judge*.

ORDER

Upon consideration of the petition for rehearing en banc filed by Plaintiff-Appellee on September 14, 1999, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

ORDINANCE

WHEREAS, Illinois law and the Municipal Code of Chicago make it unlawful for any individual under 18 years of age to purchase or be sold cigarettes, and make it unlawful for any individual under 21 years of age to purchase or be sold alcoholic liquor; and

WHEREAS, more than three million minors under the age of 18 consume more than 947 million packs of cigarettes annually in the United States, yielding gross sales to the tobacco industry each year of approximately $1 billion; and

WHEREAS, cigarettes are the most heavily advertised product in America, and the tobacco industry spends more than $421 million annually for outdoor advertising of cigarettes, and alcoholic beverages are the second most heavily advertised products in America, and the alcoholic beverages industry spends more than $100 million annually for outdoor advertising of its products; and

WHEREAS, outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as contrasted with, for example, newspapers, magazines, or radio; and

WHEREAS, the Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services; and

WHEREAS, in addition to judicial recognition of the general link between advertising and consumption, there is evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors, including articles in the *New England Journal of Medicine*, *American Journal of Public Health*, *Journal of Pediatrics*, and other scientific journals, and research has also shown that children's attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements; and

WHEREAS, studies have shown that our nation's adolescents commonly use cigarettes, and that cigarettes constitute a "gateway" drug for these youth, i.e., a substance which is used by adolescents as a first drug and opens the door for use of other "harder" substances at a later date; and studies have also shown a strong correlation between alcohol use and juvenile crime, that a striking association exists between juvenile alcohol use and suicide by firearm, and that alcohol use by minors correlates with drowning accidents, diving accidents, and school truancy and damage to school property; and

WHEREAS, an ordinance restricting the placement of advertisements for cigarettes and alcoholic beverages in publicly visible locations within the City of Chicago is a reasonable and necessary measure for reducing illegal transactions and illegal consumption of cigarettes and alcoholic beverages by minors, and for the promotion of the welfare and temperance of minors exposed to such advertisements; and

WHEREAS, the restrictions contained in the following ordinance will not unduly burden legitimate business activities of persons licensed by the City of Chicago to sell cigarettes and alcoholic beverages on a retail basis; and

WHEREAS, in order to protect legitimate business activities and to narrowly focus its efforts on those advertisements which most directly affect minors where they live, attend school, attend religious services and engage in recreational activities, the City Council has determined not to restrict advertisements of cigarettes or alcoholic beverages in certain areas hereinafter identified; now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL
OF THE CITY OF CHICAGO:

SECTION 1. Title 17 of the Municipal Code of Chicago is hereby amended by inserting a new Section 5.17, as follows:

5.17 Cigarette and alcoholic beverage advertisements.

(a) No person may place any sign, poster, placard or graphic display that advertises cigarettes or alcoholic beverages in a publicly visible location. In this section, "publicly visible locations" includes outdoor billboards, sides of buildings, and freestanding signboards. This section shall not apply to:

1. (A) With respect to cigarettes, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-64 of this code; or (B) With respect to alcoholic beverages, the placement of signs, including advertisements, inside any premises used by a holder of a license required by chapter 4-60 of this code; or (C) On commercial vehicles used for transporting cigarettes or alcoholic beverages;

2. (A) With respect to cigarettes, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-64 of this code that has been placed for the purpose of identifying such premises; or (B) With respect to alcoholic beverages, any sign that contains the name or slogan of the premises used by a holder of a license required by chapter 4-60 of this code that has been placed for the purpose of identifying such premises;

3. Any sign that contains a generic description of cigarettes or alcoholic beverages;

4. (A) With respect to cigarettes, any neon or electrically charged sign on premises used by a holder of a license required by chapter 4-64 of this code that is provided as part of a promotion of a particular brand of cigarettes; or (B) With respect to alcoholic beverages, any neon or electrically charged sign on premises by a holder of a license required by chapter 4-60 of this code that is provided as part of a promotion of a particular brand of alcoholic beverage;

5. Any sign at a special event, as that term is defined in section 10-8-335 of this code;

6. Any sign on a CTA vehicle;

7. Any sign on property owned, leased or operated by the Illinois Sports Facilities Authority;

8. Any sign at Comiskey Park, Soldier Field, the United Center, or Wrigley Field;

9. Any sign on property adjacent to an interstate highway; or

10. Any sign located in a C3 District (Commercial-Manufacturing), a C4 District (Motor Freight Terminal), or any M District (Manufacturing).

(b) This section shall not be construed to permit any display that is otherwise restricted or prohibited by law.

(c) The penalty for violation of this section shall be as set forth in section 11.13 of this Title.

SECTION 2. This ordinance may only be applied to, or interpreted to have an effect on, any contract executed after the effective date of this ordinance and to any renewal term, beginning after the effective date of this ordinance, of a pre-existing contract.

SECTION 3. This ordinance shall take effect 30 days after its passage and publication.

/s/ [ILLEGIBLE]
Alderman, 25th Ward

/s/ [ILLEGIBLE]
Alderman, 17th Ward

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1999

(Argued: September 7, 1999

Decided: October 25, 1999)

Docket No. 99-7006

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION and THE ADVERTISING CLUB OF NEW YORK, INC.,

Plaintiffs-Appellees,

—v.—

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings and ALFRED C. CERULLO, III, in his official capacity as Commissioner of the New York City Department of Finance,

Defendants-Appellants.

Before:

MCLAUGHLIN, CALABRESI, SOTOMAYOR,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Batts, *J.*), enjoining the enforcement of a New York City ordinance, the "Youth Protection against Tobacco Advertising and Promotion Act," and declaring the ordinance preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.*, and the Supremacy Clause of the United States Constitution.

AFFIRMED in part, REVERSED in part, and REMANDED.

FLOYD ABRAMS, Cahill Gordon & Reindel, New York, NY (Jonathan Donnellan, Joel Kurtzberg, Matthew A. Leish, Cahill Gordon & Reindel, Howard B. Tisch, Greater New York Metropolitan Food Council, Inc., on the brief), *for Plaintiffs-Appellees.*

ELIZABETH S. NATRELLA, Corporation Counsel's Office, City of New York, New York, NY (Michael D. Hess, Corporation Counsel, Leonard J. Koerner, and Deborah Rand, on the brief), *for Defendants-Appellants.*

DOUGLAS N. LETTER, United States Department of Justice, Washington, DC, submitted a brief and argued *for amicus curiae*, United States of America.

ELIOT D. PRESCOTT and JANE R. ROSENBERG, Assistant Attorneys General, Attorney General's Office, State of Con-

necticut, Hartford, CT, submitted a brief *for amicus curiae*, State of Connecticut.

DONALD W. GARNER, Pepperdine University Law School, Malibu, CA, submitted a brief *for amici curiae*, American Medical Association, American Heart Association, American Lung Association, American Cancer Society, Center for Science in the Public Interest, Public Citizen, Inc., Medical Society of the State of New York, Protect Our Youth, New York Public Interest Research Group, Project Friend, League of Women Voters of New York State, Campaign for Tobacco-Free Kids, The Diocese of Brooklyn Drug Prevention Program, Smokefree Educational Services, Inc., New York State Occupational Therapy Association, Coalition for Smokefree Harlem, The Heart of Harlem Cardiovascular Disease Prevention Program, Boriken Neighborhood Health Center, Bushwick Community Service Society, New York County Medical Society, Unidos Coalition, New Jersey Gasp, Alliance for Smoke-Free Air, Montefiore Medical Center/Albert Einstein Cancer Center.

ARTHUR N. EISENBERG, New York Civil Liberties Union, New York, NY submitted a brief *for amicus curiae*, New York Civil Liberties Union.

RICHARD A. SAMP and DANIEL J. POPEO, Washington Legal Foundation, Washington, DC submitted a brief *for amicus curiae*, Washington Legal Foundation.

MCLAUGHLIN, *Circuit Judge*:

BACKGROUND

This appeal stirs up a volatile mix of anti-tobacco legislation, federal preemption and First Amendment limitations upon commercial speech.

In early 1998, New York City enacted Local Law No. 3. It is entitled the "Youth Protection Against Tobacco Advertising and Promotion Act," and is codified as Article 17-A to Title 27, Chapter 1, subchapter 7, of the New York City Administrative Code §§ 27-508.1 to 27-508.6 ("Article 17-A"). Article 17-A prohibits most outdoor advertising of tobacco products (other than tobacco advertisements on motor vehicles) within one thousand feet of any school building, playground, child day care center, amusement arcade or youth center. It also prohibits most indoor advertising in the same areas if the advertisements can be seen from the street. There is one exception to the ban: a single, black-and-white, text-only "tombstone" sign stating, "TOBACCO PRODUCTS SOLD HERE," may be placed within ten feet of an entrance to a store where tobacco products are sold.

Section 1 of Local Law 3 contains a "Declaration of legislative findings and intent." According to the Declaration, Article 17-A's purpose is "to strengthen compliance with and enforcement of laws prohibiting the

sale or distribution of tobacco products to children and to protect children against such illegal sales."

Article 17-A also contains a severability clause, stating that if any portion of the ordinance should be found invalid, this will not affect the remaining portions.

On the day that Mayor Giuliani signed Article 17-A into law, the plaintiffs, various supermarket and advertising associations (collectively, the "Advertisers") brought this § 1983 action against New York City, Mayor Giuliani, and two other city officials responsible for enforcing Article 17-A (collectively, the "City") in the United States District Court for the Southern District of New York (Batts, *J.*). The Amended Complaint seeks declaratory and injunctive relief. It alleges that: (1) Article 17-A is preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331, *et seq.* (1994), and therefore violates the Supremacy Clause of the United States Constitution; and (2) Article 17-A unconstitutionally restricts commercial speech in violation of the First Amendment. After some discovery, all parties moved for summary judgment.

Relying heavily on *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994), the district court found that Article 17-A was preempted by the FCLAA's preemption provision: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b).

Noting that § 1334(b) applies to laws of political subdivisions, as well as states, *see id.* § 1332(3), the district court found that the express language of the preemption

provision embraced Article 17-A. The court rejected the City's argument that it should look to congressional intent to determine the preemptive scope of the provision. The district court found no need to examine congressional intent "in light of the fact that both the Supreme Court and the Second Circuit have directed that reliance on the express preemption provision is appropriate." Accordingly, the court awarded the Advertisers summary judgment and permanently enjoined the enforcement of Article 17-A. The district court did not reach the Advertisers' First Amendment claim.

The City now appeals. Several *amici curiae* have weighed in on both sides of the dispute.

DISCUSSION

We review a district court's award of summary judgment *de novo*, drawing all inferences and resolving all ambiguities in favor of the nonmoving party. *See Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997). Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

I. *Preemption*

We are asked to determine whether and to what extent Article 17-A is preempted by the FCLAA. The district court concluded that the FCLAA preempted Article 17-A in its entirety. We conclude, however, that the FCLAA only partially preempts Article 17-A. While the ordinance's "tombstone" provision is preempted, the

restrictions on advertising within a thousand feet of a school or playground, etc., may stand.

A. *Preemption Principles*

The Constitution directs that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Under the doctrine of preemption, a corollary to the Supremacy Clause, any state or municipal law that is inconsistent with federal law is without effect. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Federal law may preempt state and municipal law expressly or impliedly. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-204 (1983). Where, as here, a statute expressly preempts state law, our task is to "identify the domain expressly pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

As the Supreme Court has recently emphasized, we must read express preemption provisions in light of two well settled principles. *First*, our interpretation of the provision is guided by the principle that "the purpose of Congress is the ultimate touchstone in every pre-emption case," *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (citation and internal quotations and alteration omitted); and we discern congressional intent not only from the language of the preemption statute, but also from the statutory framework surrounding the provision, the "structure and purpose of the statute as a whole," and our "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* at 486 (internal quotations omitted). *Second*,

because of federalism concerns, we must interpret Congress's intent strictly, beginning with the presumption that Congress did not intend to displace state law. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Accordingly, we will not find preemption "unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

B. *The Preemptive Scope of the FCLAA*

We start with the FCLAA's preemption language: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Unhappily, this text provides little insight into the preemptive scope intended by Congress. The ambiguity resides primarily in the open-ended language extending preemption to obligations "with respect to" advertising and promotion of cigarettes. Read literally, these words could be misunderstood to preempt every conceivable obligation having a relationship—however evanescent—to the advertising and promotion of cigarettes. But this hyper-literal approach would yield results that Congress surely did not intend. To take an absurd example, it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there. Or to borrow another example mentioned by our sister circuit, it could lead to the conclusion that "states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard." *Federation*

of Advertising Indus. Representatives, Inc. v. City of Chicago, Nos. 98-3191, 99-1115 & 99-1516, ___ F.3d ___, ___, 1999 WL 682015 at *4 (7th Cir. Sept. 1, 1999).

We decline to read § 1334(b) so crudely. As Judge Learned Hand has cautioned, "[t]here is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure." *Central Hanover Bank & Trust Co. v. Commissioner*, 159 F.2d 167, 169 (2d Cir. 1947). And this is especially true in the preemption context, where "the purpose of Congress is the ultimate touchstone," and an overly-expansive, literal interpretation could subvert the presumption against preemption. The Supreme Court recently cautioned against "uncritical literalism" when interpreting similarly open-ended language in the express preemption provision of another federal statute. *Travelers Ins.*, 514 U.S. at 656 (interpreting the Employee Retirement Income Security Act's preemption provision, which extended to state laws that "relate to" any employee benefit plan). And while our analysis of § 1334(b) must perforce begin with its text, "our interpretation of that language does not occur in a contextual vacuum." *Medtronic*, 518 U.S. at 485.

Relying on our decision in *Vango Media*, the district court refused to look beyond the language of § 1334(b) or even to consider congressional intent. *Vango Media*, however, should not be read to "make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (Learned Hand, *J.*), *aff'd*, 326 U.S. 404 (1945). It is not without significance that, while our analysis of § 1334(b)'s preemptive scope in *Vango Media* began

with the language of the provision, *see Vango Media*, 34 F.3d at 72-74, we also went further to consider the stated purpose of the federal act, its historical context, and its legislative history. *See id.* at 74-75. And while we noted that § 1334(b)'s "with respect to" language connotes a potentially expansive preemptive scope, *see id.* at 73-74, we gave effect to that language only because we found that doing so would implement congressional intent. *See id.* at 74. Thus, our "touchstone" remained the legislative purpose underlying § 1334(b), as discerned not only from the language of that provision, but also from other indicia of congressional intent. We adhere to that approach.

Felicitously, Congress has provided valuable insight into the intended scope of preemption under the FCLAA:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

Two conclusions emerge when this statement is read in conjunction with the FCLAA's other provisions. *First*, Congress sought to inform the public about the health dangers of smoking by regulating advertising and labeling information. *See id.* § 1333 (detailing content and format requirements for health warnings on cigarette packages, advertisements, and billboards). *Second*, recognizing the potential burdens on the national economy that might result from the proliferation of "diverse, nonuniform, and confusing" advertising standards, Congress reserved to itself the power to regulate cigarette advertising information. *See id.* § 1334(b) (prohibiting regulations "with respect to" cigarette advertising). As the legislative history confirms, preemption was needed "to avoid the chaos created by a multiplicity of conflicting regulations." S. Rep. No. 91-566 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663.

We must therefore read § 1334(b) in light of: (1) Congress's "comprehensive Federal program" to control cigarette advertising information; and (2) its concomitant concern with avoiding "diverse, nonuniform, and confusing" advertising standards. 15 U.S.C. § 1331. This is the same approach we took in *Vango Media*. There, we held that a New York City ordinance requiring advertisers to display one anti-smoking public health message for every four tobacco advertisements displayed on New York City taxi cabs was preempted under § 1334(b). *See Vango Media*, 34 F.3d at 70. By requiring advertisers to display certain messages about smoking and health (other than those required by the FCLAA), the ordinance risked creating nonuniformity with Congress's federally mandated warning scheme. Accordingly, we found that the ordinance imposed a requirement "with respect to advertising" within the meaning of § 1334(b). It

obstructed Congress' federal scheme to regulate advertising information and risked creating the sort of "diverse, nonuniform, and confusing" standards that Congress wanted to avoid. *Id.* at 74. Noting the laudable goal of informing the public, through advertising, about the health dangers of smoking, we nevertheless held that the means chosen violated the preemption provision which Congress had enacted "in an effort to avoid the chaos of multiple diverse regulations." *Id.* at 70.

This approach tracks the Supreme Court's interpretation of § 1334(b) in *Cipollone*. Although the Court could not garner a majority to agree on how § 1334(b) should be applied in that case itself, a majority of the justices did focus their respective analyses on Congress's stated intent to avoid "diverse, nonuniform, and confusing" advertising standards. *See Cipollone*, 505 U.S. at 529 (plurality opinion) (explaining that while failure to warn claims (which were preempted) involve " 'diverse, nonuniform, and confusing' standards," intentional fraud claims (which were not preempted) do not); *see id.* at 541 (Blackmun, *J.*, concurring in part and dissenting in part) (criticizing the plurality for failing to follow consistently Congress's stated purpose of avoiding "diverse, nonuniform, and confusing regulations").

With this understanding of congressional purpose as our "touchstone," we next turn to Article 17-A, bearing in mind, of course, the presumption against preemption. *See Cipollone*, 505 U.S. at 518.

C. *Article 17-A: The Tombstone Provision*

One provision of Article 17-A clearly presents problems similar to the ordinance in *Vango Media*. Specifically, the tombstone provision limits advertising

information in the restricted areas to black-and-white signs stating "TOBACCO PRODUCTS SOLD HERE;" colors, nontextual images, and non-conforming messages are prohibited. Like the ordinance in *Vango Media*, the tombstone provision thus creates obligations directly pertaining to the nature and content of advertising information. This risks the sort of "diverse, nonuniform, and confusing" advertising standards that Congress expressly sought to avoid. Congress could not have intended to let municipalities promulgate their own unique regulations governing the content and format of cigarette advertising information. *See Phillip Morris Inc. v. Harshbarger*, 122 F.3d 58, 76 (1st Cir. 1997) (noting that "a quintessential state requirement 'with respect to advertising and promotion' would be a law mandating changes or additions to the content of cigarette advertisements") (alteration omitted). Accordingly, we conclude that Article 17-A's tombstone provision is a regulation "with respect to" advertising within the meaning of § 1334(b).

The City nevertheless contends that the tombstone provision is not preempted by § 1334(b). The City makes two arguments. Neither is persuasive.

First, the City asserts that the tombstone provision is not a "requirement or prohibition" within the meaning of § 1334(b) because it is permissive, rather than mandatory. We disagree. Although the tombstone provision is "permissive" in the literal sense that an advertiser is not "required" to post a tombstone sign at all, this does not meaningfully distinguish it from the "requirement" we found preempted in *Vango Media*. That ordinance was similarly "permissive" in that it did not require advertisers to display ads. But if they chose to do so, they had to comply with certain conditions, namely, the posting of a certain number of anti-smoking public health mes-

sages. It is clear that this sort of "permissiveness"—vaguely reminiscent of Hobson's choice—is not dispositive. We find that the tombstone provision imposes a "requirement or prohibition" within the meaning of § 1334(b); it is a "positive enactment" of a political subdivision that "imposes conditions on [the] display of cigarette advertisements." *Vango Media*, 34 F.3d at 72, 75.

Second, the City makes the startling contention that the tombstone provision—and indeed, the entirety of Article 17-A—is not "based on smoking and health" within the meaning of § 1334(b), but is instead aimed solely at promoting law enforcement. For support, the City points to the "Declaration of legislative findings and intent," which announces that the purpose of the ordinance is: "to strengthen compliance with and enforcement of laws prohibiting the sale or distribution of tobacco products to children and to protect children against such illegal sales." We are unpersuaded by this sophistry.

We do not blindly accept the articulated purpose of an ordinance for preemption purposes. *See Vango Media*, 34 F.3d at 73. If that were the rule, legislatures could "nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88, 106 (1992) (quoting *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971)). That the City Council drafted a declaration of intent that recites a law enforcement goal while scrupulously avoiding any mention of the word "health" simply cannot control our preemption analysis. Instead, we

follow *Vango Media* and consider both the *purpose* of the ordinance as a whole, and the ordinance's actual *effect*, to determine whether it is "based on smoking and health." *See Vango Media*, 34 F.3d at 73 (citing *Gade*, 505 U.S. 88).

The *Vango Media* analysis makes clear that Article 17-A is indeed "based on smoking and health." We agree with the district court that the legislative history of the ordinance is "replete" with references to the twin purposes of promoting "health" and combating the dangers of smoking.[1] Moreover, the effect of Article 17-A is clearly to promote health because the underage tobacco sales prohibitions whose enforcement it explicitly seeks to promote are inherently based on health concerns.

We find that Article 17-A's tombstone provision is a "requirement . . . based on smoking and health . . . with respect to advertising or promotion of cigarettes." Accordingly, it is preempted under § 1334(b). We therefore affirm that part of the district court's judgment holding that this portion of Article 17-A was preempted.

D. *Article 17-A: The 1000-Foot Verboten Zone*

We reach a different conclusion as to the remaining provisions of Article 17-A, which essentially regulate

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[1] The Health Committee of the City Council convened on several occasions to consider health-related concerns. The first speaker at the first such meeting, for instance, endorsed the ordinance specifically because "children's lives are at risk." Speaker Peter Vallone, the primary sponsor of the law, himself detailed the health risks of smoking and later urged that "the health and safety of our kids just can't wait." Another City Council member was just as emphatic that "it is a health issue, period." We note also that the law itself provides extensive discussion of the disturbing rise in teen smoking, attributed in part to a proliferation of ads portraying smoking as "safe and healthful."

the physical placement of advertising. As to these provisions, we join the only two federal courts of appeals that have addressed § 1334(b)'s effect on similar laws and hold that they are not preempted. *See Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, Nos. 98-3191, 99-1115 & 99-1516, ___ F.3d ___, ___, 1999 WL 682015 (7th Cir. Sept. 1, 1999); *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1030 (1996), *readopted as modified on remand*, 101 F.3d 332 (4th Cir. 1996)). Specifically, we find that these location restrictions do not impose obligations "with respect to" advertising as that phrase is used in § 1334(b).

Article 17-A's location restrictions do not implicate the same concerns as the ordinance's tombstone provision or the ordinance in *Vango Media*. The location restrictions do not touch upon Congress's "comprehensive Federal program" to control cigarette advertising information. The restrictions do not, for example, burden advertisers with a duty to warn. Nor do they impose content and format requirements on advertising information.

Instead, those provisions restrict only the physical placement of tobacco advertising signs in a manner akin to a run of the mill zoning regulation. To be sure, Article 17-A's restrictions are unusual in that they ban only signs advertising tobacco, and not other products.[2] However, this disparity does not interfere with the congressional purpose underlying the FCLAA. We do not see—and the Advertisers do not explain—how mere

[2] We express no opinion whether this targeting of tobacco advertising runs afoul of the First Amendment. *See infra* at Section II. In this discussion, we conclude only that New York City's regulation of ad placement is not preempted under the FCLAA.

location restrictions can lead to the sort of "diverse, nonuniform, and confusing" advertising standards that Congress sought to avoid when it enacted § 1334(b). *See Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co.*, 126 F.3d 61, 67 (2d Cir. 1997) (discussing ERISA's preemption provision and stating that "a party challenging a statute must convince a court that there is something in the practical operation" of the statute to show that it is the type of law that Congress wanted to preempt). Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without Article 17-A, a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances. And no party suggests that such *zoning* regulations fall within the intended purview of § 1334(b). We see no reason to treat the location restrictions before us any differently.

We also note that the presumption against preemption is particularly strong here, as these provisions are the sort thought to lie within the heartland of the states' historic police powers. *See Medtronic*, 518 U.S. at 485. Zoning regulations on the placement of outdoor advertisements have long been held to lie peculiarly within the states' historic police powers. *See Packer Corp. v. Utah*, 285 U.S. 105, 111 (1932) (upholding a Utah statute banning outdoor advertisements of cigarettes and describing it as a "wholly intrastate" prohibition); *see also Federation of Advertising*, ___ F.3d ___, ___, 1999 WL 682015 at *5 (citing cases). So too, regulations directed at the safety and welfare of children "lie[ ] at the heart of the states' police powers." *Toy Mfrs. of America, Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d Cir.

1992). Article 17-A's location restrictions embody both of these intensely local areas of regulation. Although Congress can choose to preempt such state police power regulations if its intent to do so is "clear and manifest," *Vango Media*, 34 F.3d at 72 (quoting *Cipollone*, 505 U.S. at 516) (internal quotations omitted), we find no such clear intent here. To the contrary, the legislative history of § 1334(b) suggests that Congress wanted to give such regulations a wide berth. *See* S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. at 2663 (noting that § 1334(b) is "narrowly phrased" and "would in no way affect [local power] with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, *or similar police regulations*" (emphasis added)).

E. *Severability*

In light of our determination that only the tombstone provision is preempted by the FCLAA, we must determine whether that provision is severable from the remaining portions of the ordinance. Severability questions are governed by state law. *See Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 60 (2d Cir. 1988). In New York, the test for severability is "whether the Legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.' " *See In re New York State Superfund Coalition, Inc. v. New York State Dep't of Envtl. Conservation*, 75 N.Y.2d 88, 94, 550 N.E.2d 155, 157, 550 N.Y.S.2d 879, 881 (N.Y. 1989) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (N.Y. 1920)).

We find that the tombstone provision is indeed severable from the rest of Article 17-A. That the City

Council would have wished the bulk of Article 17-A to be upheld despite the invalidity of the tombstone provision seems beyond doubt. Severance of the tombstone provision would not, in our view, significantly interfere with the central thrust of Article 17-A—to limit cigarette advertising in areas where young people are likely to congregate. This conclusion is reinforced by the City Council's inclusion of an express severability clause indicating its general desire to salvage any valid portions of the ordinance in the event that another portion is adjudged invalid. *See National Adver. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (New York law) (noting that "[t]he preference for severance is particularly strong when the law contains a severability clause").

We conclude, therefore, that while the tombstone provision of Article 17-A is preempted by § 1334(b), the remaining provisions of the ordinance are valid and enforceable.

II. *First Amendment*

The parties urge us to decide whether Article 17-A unduly restricts commercial speech in violation of the First Amendment. However, because the district court granted summary judgment to the Advertisers on preemption grounds alone, it did not pass upon the merits of the First Amendment claim. In our view, the district court should have the opportunity to consider this issue in the first instance. *See Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1110 (2d Cir. 1992). We remand so that it may do so.

CONCLUSION

We have considered the parties' remaining contentions and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court insofar as it held that the tombstone provision of Article 17-A is pre-empted under the FCLAA, REVERSE insofar as it held that the remaining provisions of Article 17-A are pre-empted, and REMAND for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Argued March 6, 1995
Decided Aug. 31, 1995
No. 94-2141

PENN ADVERTISING OF BALTIMORE INCORPORATED,

Plaintiff-Appellant,

—v.—

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; Kurt L. Schmoke, in his official capacity as Mayor of Baltimore City; David Tanner, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

The American Advertising Federation; the American Association of Advertising Agencies; the Association of National Advertisers, Incorporated; the Outdoor Advertising Association of America, Incorporated; Washington Legal Foundation; the City of Cincinnati, Ohio; the Maryland Congress of Parents & Teachers, Incorporated; the Coalition for Beautiful Neighborhoods; Baltimore City Wide Liquor Coalition for Better Laws and Regulations; City and County of San Francisco; City of San Jose,

Amici Curiae.

ARGUED: Eric Michael Rubin, Rubin, Winston, Diercks, Harris & Cooke, Washington, DC, for appellant. Burton Harry Levin, Assistant Solicitor, Baltimore, MD, for appellees. ON BRIEF: Walter E. Diercks, Jeffrey Harris, Rubin, Winston, Diercks, Harris & Cooke, Washington, DC, for appellant. Neal M. Janey, City Solicitor, Sandra R. Gutman, Associate Solicitor, Department of Law, Baltimore, MD, for appellees. Richard E. Wiley, Lawrence W. Secrest, III, Daniel E. Troy, Luis de la Torre, Frank Winston, Jr., Wiley, Rein & Fielding, Washington, DC, for amici curiae American Advertising Federation, et al. Mark S. Yurick, Senior Assistant City Solicitor, Office of the City Solicitor, Cincinnati, OH, for amicus curiae City of Cincinnati. Daniel J. Popeo, Richard A. Samp, Washington Legal Foundation, Washington, DC, for amicus curiae Washington Legal Foundation. Donald Garner, Professor of Law, Southern Illinois University, Carbondale, IL; the Maryland Congress of Parents & Teachers, Inc., Baltimore, MD, for amicus curiae Maryland Congress. Christopher J. Fritz, Julie Ellen Squire, Thomas C. Dame, Gallagher, Evelius & Jones, Baltimore, MD, for amici curiae Coalition for Beautiful Neighborhoods, et al. Louise H. Renne, City Attorney, Dannis Aftergut, Chief Assistant City Attorney, Barbara Solomon, Deputy City Attorney, John Cooper, Deputy City Attorney, San Francisco, CA, for amicus curiae San Francisco; Joan Gallo, City Attorney, George Rios, Assistant City Attorney, San Jose, CA, for amicus curiae San Jose.

Before NIEMEYER and HAMILTON, *Circuit Judges*, and BUTZNER, *Senior Circuit Judge*.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

OPINION

NIEMEYER, *Circuit Judge*:

We must decide in this case (1) whether Ordinance 307 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor, "advertising that advertises cigarettes" in certain areas of the City, is preempted by the Federal Cigarette Labeling and Advertising Act or by Maryland statutes prohibiting the sale of cigarettes to minors or the possession of cigarettes by minors; and (2) whether that ordinance violates the First and Fourteenth Amendment protections of commercial speech. The district court, granting Baltimore's motion for summary judgment, ruled that neither federal nor state law preempts the operation of Baltimore's ordinance and that the ordinance is a permissible regulation of commercial speech under the four-part test announced in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 US. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). We affirm.

I

Even before 1994, it was illegal in Maryland for any person to purchase cigarettes for, or sell them to, "any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). In 1994, Maryland also enacted statutes, effective October 1, 1994, prohibiting minors from using or possessing "any tobacco product." Md.Ann.Code art. 27, §§ 404 & 405A (Supp.1994). A few months earlier, in April 1994, the Mayor and City Council of Baltimore (collectively "Baltimore"), in a further effort to reduce the illegal consumption of cigarettes by minors, enacted Ordinance 307. The ordinance prohibits the placement of any sign that "advertises cigarettes in a publicly visible location," *i.e.* on "outdoor billboards, sides of building[s], and free standing signboards."[1] The prohibition

[1] The core provision of Ordinance 307 provides:

> Cigarette advertisements. No person may place any sign, poster, placard, device, graphic display, or other form of advertising

contained in Ordinance 307 parallels the scope and language of Baltimore City Ordinance 288, enacted in January 1994, which regulates the advertising of alcoholic beverages. Thus, the prohibition against cigarette advertising in Ordinance 307 mirrors Ordinance 288's exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contains an exception permitting such advertising in certain commercially and industrially zoned areas of the City.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously-conducted studies detailing the correlation between cigarette advertising and the consumption of cigarettes by minors. The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position. The City Council also relied on the 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education to support its conclusion that cigarettes are the second most commonly abused substance by Maryland adolescents, with approximately 42% of twelfth graders and 11% of sixth graders having smoked cigarettes in the previous 12 months. The City Council emphasized further that 75% of twelfth graders had smoked cigarettes before the age of 15. It noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear[ ] to 'open the door' for use of other

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that advertises cigarettes in a publicly visible location. In this section "publicly visible location" includes outdoor billboards, sides of building[s], and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(I). By its terms, the ordinance became effective April 6, 1994.

harder drugs at a later date." Therefore, to reduce the illegal consumption of cigarettes by minors, the City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements in the City.

On April 6, 1994, the date on which Ordinance 307 became effective, Penn Advertising of Baltimore, Inc., filed suit in federal court to enjoin the ordinance's enforcement and to obtain a declaratory judgment (1) that the ordinance is preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), and by Maryland statutes regulating the sale of cigarettes, and (2) that the ordinance violates the First and Fourteenth Amendments. Penn Advertising, which leases land from private property owners, maintains outdoor signs on those locations, and rents them to its customers, filed suit to protect its business of placing cigarette advertisements on outdoor signs located in Baltimore.

With its complaint, Penn Advertising filed a motion for a preliminary injunction to enjoin, pending litigation, enforcement of Ordinance 307. In response, Baltimore filed a motion to dismiss or, in the alternative, for summary judgment. While Penn Advertising obtained some discovery following the filing of these motions, it desired to conduct more discovery and thus filed a motion to extend the time to file its opposition to Baltimore's summary judgment motion. The district court denied the motion and established a briefing schedule for the parties. The court also entered an order staying enforcement of the ordinance.

On August 15, 1994, the district court filed a memorandum opinion granting Baltimore's motion for summary judgment. The district court concluded that Ordinance 307 is preempted neither by the Federal Cigarette Labeling and Advertising Act nor by Maryland state law. On the First Amendment issue, the court concluded that Ordinance 307 satisfied all four prongs of the *Central Hudson* test and was thus a permissible regulation of commercial speech. This appeal followed.[2]

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[2] Amici curiae briefs were received in this appeal from the American Advertising Federation, the American Association of Advertising

II

We address first a preliminary contention that the district court abused its discretion in refusing to extend Penn Advertising's time to conduct discovery and respond to Baltimore's motion for summary judgment. Penn Advertising argues that the court granted summary judgment "before there had even been adequate time for Penn Advertising to assemble a full evidentiatry record and after denying Penn Advertising's motion for leave to take discovery for the purpose of further establishing the disputed factual record."

While the district court granted Penn Advertising a short extension to respond to the motion for summary judgment, it did not generally open up the case for discovery before ruling on the issues. It concluded that such discovery was not necessary in view of the nature of the issues presented. The district court stated that the question presented are "legal questions ripe for decision" because the case concerns "a facial attack on the legal sufficiency of an ordinance." *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 862 F.Supp. 1402, 1405 (D.Md.1994). Penn Advertising nonetheless was able to oppose the motion for summary judgment with affidavits, various studies, and samples of advertising, and has failed to identify any further materials or theories which it desired, but was unable, to present to the district court.

We agree that the issues presented to the district court were questions of law which could be resolved without further development of the factual record. The preemption issue rests on a legal interpretation of the federal statute which allegedly preempts the ordinance. As the Supreme Court

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Agencies, the Association of National Advertisers, Inc., the Outdoor Advertising Association of America, Inc., the Washington Legal Foundation, the Maryland Congress of Parents & Teachers, Inc., the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, the City of Cincinnati, the City and County of San Francisco, and the City of San Jose.

noted in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." Our interpretation of the instant issue as involving solely a question of law is also consistent with the procedural posture of the *Cipollone* case before the Supreme Court, *i.e.* on review of a motion under Federal Rule of Civil Procedure 12(f) to strike the preemption defense as a matter of law.

Furthermore, we agree with the district court that a facial challenge to an ordinance restricting commercial speech may be resolved as a question of law when the government meets the burden placed on it by *Central Hudson*. We decided the same question in the companion case of *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir.1995), where we stated:

> [I]n response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

63 F.3d at 1311. The determinative question in reviewing a facial challenge to an ordinance thus is whether the legislative body acted with the objectively reasonable belief that the means it selected fit the objective sought. The issue is not whether the substantive findings on which it relied are incontrovertibly true. As we explained in *Anheuser-Busch*:

> While a party [facially] challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other.

63 F.3d at 1312.

Since the burden of justifying the ordinance falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or common sense, an understanding of the ordinance's factual impact on particular parties is not necessary to the inquiry. *Id.*, 63 F.3d at 1311-12. Accordingly, we conclude that the district court did not abuse its discretion in this case by ruling on the summary judgment motion without allowing further discovery.

III

Penn Advertising contends that Ordinance 307 is void because Baltimore's authority to enact such a measure was preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, which provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). That Act mandates that one of several specified warning messages be placed on each package of cigarettes and prohibits cigarette advertising on television and radio. *See* 15 U.S.C. §§ 1331-1340. Penn Advertising argues that since Ordinance 307's prohibition of cigarette advertising is "based on smoking and health," it is preempted by the

federal statute. Its argument rests entirely on the analysis of § 5(b) of the federal act conducted by the Supreme Court in *Cipollone v. Liggett Group, Inc.*

The lawsuit in *Cipollone* was predicated on the smoking-related death of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984. Her son sought damages from cigarette manufacturers, contending that cigarette smoke caused his mother's death. His suit, based on New Jersey common law, alleged common law claims involving design defects; failure to warn; breach of express warranty; fraudulent misrepresentation; conspiracy to defraud; and negligence in the manner in which cigarettes were tested, researched, sold, promoted and advertised. On the cigarette manufacturers' contention that Cipollone's claims were preempted by the Federal Cigarette Labeling and Advertising Act, the Supreme Court held:

> [T]he 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

505 U.S. at 530-31, 112 S.Ct. at 2625. To reach this conclusion, the Court conducted a count-by-count analysis of the common law claims to determine whether each claim implicated duties to warn or to label in connection with smoking and health. The Court explained:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact preempted.

Id. at 523, 112 S.Ct. at 2621. To sort out those claims that were preempted, the Court stated:

> The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition *based on smoking and health . . . imposed under state law with respect to . . . advertising* or promotion," giving that clause a fair but narrow reading.

Id. at 523-24, 112 S.Ct. at 2621 (emphasis added). The Court went on to clarify that the appropriate inquiry is "not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at 525, 112 S.Ct. at 2622. *See also Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73-74 (2d Cir.1994) (holding that Federal Cigarette Labeling and Advertising Act preempts ordinance requiring city-licensed facilities to display one message addressing the dangers of smoking for every four tobacco advertisements displayed).

Applying the methodology described in *Cipollone* to Ordinance 307, we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*. Moreover, the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media. The regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated. A regulation with such a general relationship to cigarette smoking—in contrast to a specific advertising "prohibition based on smoking and health"—is not preempted by the Federal Cigarette Labeling and Advertising Act. Were the preemption provision to be interpreted so broadly, the Supreme Court in *Cipollone* could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and

conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes. *See Cipollone*, 505 U.S. at 523-31, 112 S.Ct. at 2621-25.

For similar reasons, we conclude that the Maryland statutes prohibiting the sale of cigarettes to minors and the use and possession of cigarettes by minors, *see, e.g.*, Md.Ann.Code art. 27, §§ 404 & 405A (supp. 1994), and Md.Ann.Code, Business Regulation art., § 16-101 *et seq.*, do not preempt the City's ordinance. Penn Advertising argues that Ordinance 307 is invalid because it impliedly was preempted by these state statutes under the doctrine of "preemption by implication" set forth in *Allied Vending, Inc. v. Bowie*, 332 Md. 279, 631 A.2d 77 (1993). The court in *Allied Vending* explained that there may be times when " 'the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of preemption by occupation is compelled.' " *Id.* at 298, 631 A.2d 77 (quoting *Mayor and City Council of Baltimore v. Sitnick*, 254 Md. 303, 323, 255 A.2d 376 (1969)). The reasoning of *Allied Vending*, however, lends little support to Penn Advertising's claim. We can find nothing in §§ 404 and 405A of Article 27 or § 16-101 *et seq.* of the Business Regulation Article that indicates an attempt by the Maryland legislature to preempt the field of cigarette advertising. Moreover, Ordinance 307, which only limits the place and manner of cigarette advertising, is not in conflict with the state provisions prohibiting their sale to minors. For the reasons stated above, as well as those articulated by the district court in its well-reasoned opinion, *see Penn Advertising*, 862 F.Supp. at 1415-20, we reject the contention that Ordinance 307 is preempted and therefore null and void.

IV

Finally, Penn Advertising contends that Ordinance 307 is an impermissible regulation of commercial speech under the four-prong scheme announced in *Central Hudson*. As that case explains, in order for commercial speech to be entitled to

any First Amendment protection, the speech must first concern lawful activity and not be misleading. *See Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets those threshold criteria, a state may nevertheless regulate it if (2) the state is able to assert a substantial interest in support of the regulation; (3) the state demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) the regulation is not "more extensive than is necessary" to serve the interest. *Id.* at 566, 100 S.Ct. at 2351.

The governmental interest asserted in this case is to promote compliance with the state prohibition of the sale of cigarettes to minors. The district court concluded that the ordinance also furthers the obvious public policy underlying such a prohibition, "which is to prevent the purchase, and thus the consumption, of cigarettes by minors." *Penn Advertising*, 862 F.Supp. at 1406. In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest.

The principal dispute in this case centers on *Central Hudson's* third and fourth prongs which question whether Ordinance 307 directly advances Baltimore's stated public interest in reducing minors' cigarette consumption and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry under these two prongs of *Central Hudson* involves consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See United States v. Edge Broadcasting Co.*, — U.S. —, —, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986).

These same issues were resolved in favor of Baltimore in the related case of *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir.1995). In *Anheuser-Busch*, the City relied on

numerous studies that linked alcohol advertising to underage drinking to meet *Central Hudson*'s third prong. In response to Anheuser-Busch's challenge to those conclusions, we stated:

> There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

63 F.3d at 1314. Similarly, in our examination of whether the advertising regulation was narrowly tailored to meet *Central Hudson*'s fourth prong, we concluded in *Anheuser-Busch*:

> If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.

63 F.3d at 1316.

For the reasons advanced in *Anheuser-Busch*, we conclude here that, while the fit between the City's objectives and the means selected to achieve them may not be perfect, it never-

theless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
D.C. No. CV-97-05076-RJB
OPINION

JAMES R. LINDSEY; SUN CHA LINDSEY, and and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA-PIERCE COUNTY BOARD OF HEALTH; FEDERICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA, a municipal corporation,

Defendants.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
August 11, 1999—Seattle, Washington
Filed November 19, 1999

Before: William C. Canby, Jr., Melvin Brunetti,
and Diarmuid F. O'Scannlain, *Circuit Judges*.

Opinion by Judge Brunetti

COUNSEL

Floyd Abrams, Cahill Gordon & Reindel, New York, New York, for the plaintiffs-appellants.

Clifford D. Allo, Tacoma-Pierce City Health Department, Tacoma, Washington, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

In 1996, the Tacoma-Pierce County Health Department Board of Health adopted a resolution that bans outdoor tobacco advertising within Pierce County, Washington. The Board adopted the ban in an attempt to reduce underage tobacco use in the county. The Lindseys, owners of convenience stores who are licensed to sell tobacco products in the State of Washington, filed this action against the Board of Health and other defendants alleging that the Board's resolution was (1) an unconstitutional regulation of commercial speech under the First Amendment; (2) preempted by the Fed-

eral Cigarette Labeling and Advertising Act; (3) preempted by the Washington Tobacco Access to Minors Act; and (4) beyond the Board's statutory authority. The district court granted the Board's motion for summary judgment and entered a judgment in its favor. The Lindseys appeal from the district court's final judgment in favor of the Board. We have jurisdiction under 28 U.S.C. § 1291 and reverse because a local ban on outdoor tobacco advertising is preempted by the Federal Cigarette Labeling and Advertising Act.

I.

James Lindsey and Sun Cha Lindsey—plaintiffs-appellants—are husband and wife and the owners of neighborhood convenience stores located in Tacoma, Washington. The Lindseys hold a cigarette retailers' license issued by the State of Washington and sell cigarettes and other tobacco products at their stores. Prior to March 1, 1997, the Lindseys displayed tobacco advertisements inside and outside their stores and received compensation from tobacco companies based on the volume of their tobacco sales, their participation in promotional programs, and their utilization of brand advertisements. On March 1, 1997, the Tacoma-Pierce County Health Department Board of Health's Resolution No. 96-1997 went into effect banning all "outdoor advertising of tobacco and tobacco products . . . within the jurisdiction of the Tacoma-Pierce County Health Department Board of Health." As a result of the Board's resolution, the Lindseys were forced to discontinue their use of outdoor tobacco advertisements.

The Tacoma-Pierce County Health Department Board of Health ("Board")—defendant-appellee—is a combined city-county health department created by the City of Tacoma and Pierce County. Under the Washington Revised Code, the Board has the authority to "[e]nact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof." Wash. Rev. Code § 70.05.060. Pursuant to this

authority, the Board adopted Resolution No. 96-1997, the Truth in Outdoor Tobacco Advertising Regulation ("Resolution"), on December 4, 1996, banning outdoor tobacco advertising in Pierce County.

The Board justified its adoption of the Resolution based on its findings that "[t]obacco advertising, whether intended to promote tobacco use or only compete for market share, has the consequence of promoting tobacco use" and that "[t]obacco advertising induces children to initiate tobacco use." The Board specifically targeted all outdoor tobacco advertisements because it believed that outdoor advertisements intrude into public spaces and induce minors to use tobacco. The Board, therefore, banned all tobacco advertisements that can be seen from the street unless the advertisements are presented in a tombstone format.

Under the Resolution's tombstone exception, licensed tobacco retailers can post price and availability information outside their businesses so long as the advertisements are in plain black type on a white field without adornment, color, opinion, artwork, or logos. The Resolution does not otherwise regulate the content of tobacco advertisements. No tombstone advertisement can be displayed, however, if it is visible from a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school or within one thousand feet of a school, playground, or public park. The Resolution does not regulate tobacco advertisements located inside retail establishments unless the advertisements can be seen from the street. A retailer who violates the Resolution can be fined one hundred dollars per day for each advertisement that violates the regulation.

The Lindseys filed this action against the Board and various other defendants alleging that the Resolution is invalid because it is: (1) preempted by the Federal Cigarette Labeling and Advertising Act; (2) an unconstitutional regulation of commercial speech under the First Amendment of the United States Constitution; (3) preempted by Washington's Tobacco Access to Minors Act; and (4) an impermissible exercise of

legislative authority beyond the Board's statutory authority. The Lindseys and the Board filed cross-motions for summary judgment and partial summary judgment on the federal preemption, state preemption, and scope of authority claims. The district court, in a published order, denied the Lindseys' motion for summary judgment, granted the Board's motion for partial summary judgment, and dismissed the Lindseys' federal preemption, state preemption, and scope of authority claims. *See Lindsey v. Tacoma-Pierce County Health Dep't*, 8 F. Supp. 2d 1213 (W.D. Wash. 1997). The district court reasoned that: (1) the Resolution was not preempted by the Federal Cigarette Labeling and Advertising Act because the Resolution only regulates the location and not the content of cigarette advertisements; (2) the Resolution was not preempted by state law because the Resolution does not directly regulate indoor advertising; and (3) the Board did not exceed its authority when it adopted the Resolution because the Resolution is reasonably related to the Board's authority to enact regulations that promote and improve public health.

The Lindseys and the Board subsequently filed another round of summary judgment motions on the Lindseys' First Amendment claim. The district court, in another published order, denied the Lindseys' motion, granted the Board's motion, and dismissed the Lindseys' First Amendment claim concluding that the Resolution was a constitutional regulation of commercial speech under *Central Hudson*. *See Lindsey v. Tacoma-Pierce County Health Dep't*, 8 F. Supp. 2d 1225, 1226 (W.D. Wash. 1998). The district court reasoned that the Resolution was constitutional because it was sufficiently related to its purpose of reducing underage tobacco use and because non-speech alternatives to the regulation did not exist. The Lindseys appeal from the district court's final judgment entered in favor of the Board. We have jurisdiction under 28 U.S.C. § 1291 and now reverse.

II.

We review a grant of summary judgment de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Margolis*, 140 F.3d at 852; *Bagdadi*, 84 F.3d at 1197. In regard to the relevant substantive law at issue in this case, a district court's decision regarding federal preemption is reviewed de novo, *see Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998), as is a district court's interpretation and construction of a federal statute. *See Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998); *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir. 1998).

III.

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Issues of federal preemption arising under the Supremacy Clause, however, "start with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congressional intent is, therefore, the " 'ultimate touchstone' of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actu-

ally conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in the legislative field. *See Cipollone*, 505 U.S. at 516. When, however, Congress considers the issue of preemption and adopts a preemption statute that provides a reliable indication of its intent regarding preemption, the scope of federal preemption is determined by the preemption statute and not by the substantive provisions of the legislation. *See id.* at 517. The reason is that "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* Because Congress adopted an explicit preemption statute when it enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA") that provides a reliable indication of Congress' intent regarding preemption, the federal preemption issue in this case is "governed entirely by the express language" of the FCLAA's preemption statute. *Cipollone*, 505 U.S. at 517.

A.

After a Surgeon General's advisory committee reported in 1964 that cigarette smoking is a health hazard, the Federal Trade Commission ("FTC") promulgated a trade regulation that would have required tobacco companies " 'to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container of cigarettes that cigarette smoking is dangerous to health and may cause death from cancer and other diseases.' " *Cipollone*, 505 U.S. at 513 (quoting 29 Fed. Reg. 8325 (1964)). In addition to the FTC, a number of states also acted in response to the advisory committee's report and considered regulating the labeling and advertising of cigarettes. *See id.* With the prospect of diverse, nonuniform, and confusing cigarette labeling and advertising regulations looming over the tobacco industry, Congress enacted the FCLAA in 1965 to adequately inform the public about the health hazards of smoking and to protect the national econ-

omy from the burdens of diverse regulations related to cigarette advertising and labeling. *See id.* at 514; *see also* 15 U.S.C. § 1331.

To inform the public about the possible dangers of smoking, the FCLAA required that all cigarette packages contain a conspicuous warning label stating: "Caution: Cigarette Smoking May Be Hazardous To Your Health." *Cipollone*, 505 U.S. at 514 (internal quotations omitted). To prevent diverse regulations, the FCLAA preempted advertising and labeling regulations related to smoking and health. The FCLAA's preemption provisions provided:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id. at 514. The FCLAA also contained a termination provision which stated that the FCLAA's advertising regulations would terminate on July 1, 1969. *See id.*

As July 1, 1969, approached, the FTC, Federal Communications Commission, and several states again contemplated the regulation of tobacco advertising and labeling. For the same reasons that Congress originally adopted the FCLAA in 1965, Congress amended the FCLAA by enacting the Public Health Cigarette Smoking Act of 1969 ("PHCSA"). The PHCSA, in relevant part, expanded the scope of the FCLAA's preemption provisions. Since the adoption of the PHCSA in 1969, the FCLAA's preemption statutes have provided:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to

> the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.

The plain language of the FCLAA preempts any state law that imposes a requirement or prohibition based on smoking and health with respect to cigarette advertising. *See Cipollone*, 505 U.S. at 523-24; *see also Vango Media, Inc. v. City of New York*, 34 F.3d 68, 72 (2d Cir. 1994) ("We need only determine whether the Local Law impose[s] a requirement or prohibition based on smoking and health with respect to the advertising or promotion of any cigarettes.") (internal quotations and ellipses omitted). The Board's resolution banning outdoor tobacco advertising in Pierce County is preempted by the express language of the FCLAA because the resolution imposes a requirement or prohibition based on smoking and health with respect to cigarette advertising.

The Resolution is a requirement or prohibition because the phrase "requirement or prohibition" encompasses positive enactments adopted by political subdivisions, *see Cipollone*, 505 U.S. at 521; *Vango Media*, 34 F.3d at 72-73, and because the Resolution expressly prohibits outdoor tobacco advertising in Pierce County. The Resolution also imposes a requirement on cigarette advertising because it requires availability advertisements to be printed in a legislatively defined tombstone format—"plain black type on a white field without adornment and unaccompanied by color, opinion, artwork, or logos." The Resolution is based on smoking and health because, in the words of the Board, it "pertains to matters of health and safety of the citizens of Pierce County." In fact, the findings which are included in the Resolution to justify the Board's ban on outdoor tobacco advertising almost exclusively refer to the various health risks that are related to cigarette smoking. Finally, the Resolution is a requirement or prohibition with respect to cigarette advertising because the Resolution expressly prohibits outdoor tobacco advertisements and regulates point of sale availability information. The

Resolution is, therefore, preempted by the clear and express language of the FCLAA because it creates a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b).

B.

The Board does not contend that the plain language of the FCLAA fails to preempt its ban on outdoor tobacco advertisements. Rather, the Board attempts to evade the express language of the FCLAA's preemption provision by citing to the Fourth Circuit's opinion in *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *affirmed on remand*, 101 F.3d 332 (4th Cir. 1996), and arguing that the FCLAA does not preempt its resolution because the FCLAA only preempts local laws that regulate the content rather than the location of cigarette advertisements. We find the Board's argument and the Fourth Circuit's decision in *Penn Advertising* unpersuasive, and we decline to follow the reasoning of our sister circuit because it ignores the history, purpose, and language of the FCLAA and is not supported by Supreme Court precedent.

Penn Advertising addressed the issue of whether a city ordinance that prohibits the placement of any sign advertising cigarettes in a publicly visible location was preempted by the FCLAA (*see id.* at 1320-21), and concluded that such an ordinance was not preempted by the FCLAA because an ordinance which regulates the location rather than the content of cigarette advertisements is not based on smoking and health. *Penn Advertising* relied on the Supreme Court's decision in *Cipollone* and reasoned that if the FCLAA did not preempt the common law warranty, misrepresentation, fraud, and conspiracy claims filed in *Cipollone*, the FCLAA did not preempt the City of Baltimore's general ban on publicly visible tobacco advertisements.

Penn Advertising misconstrues *Cipollone* when it concludes that content regulations can be distinguished from location regulations under the FCLAA because *Cipollone* does not support such a distinction. In *Cipollone*, the Court had to determine whether state common law actions filed against tobacco companies for failure to warn, breach of warranty, fraudulent misrepresentation, and conspiracy were preempted by the FCLAA. *See Cipollone*, 505 U.S. at 508-09. A plurality of the Court addressed each common law claim individually stating that *"[t]he central inquiry* in each case *is straightforward*: we ask whether the legal duty that is the predicate of the common-law damages action *constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'* giving that clause a fair but narrow reading." *Id.* at 523-24 (Stevens, J., plurality) (emphasis added). The plurality opinion expressly recognized that the plain language of the FCLAA is determinative to resolving preemption issues regarding tobacco advertising.

The plurality held that failure to warn claims were preempted by the FCLAA to the extent that such claims required a plaintiff to show that tobacco advertisements should have included additional or more clearly stated health warnings. *See id.* at 524-25. The plurality reasoned that such failure to warn claims were preempted because they relied on "a state-law requirement or prohibition . . . with respect to . . . advertising or promotion." *Id.* at 524. The plurality noted, however, that failure to warn claims based on negligent testing and research practices were not preempted by the FCLAA because such claims were unrelated to advertising and promotional practices. *See id.* at 524-25.

The plurality concluded that express warranty claims were not preempted by the FCLAA because liability for express warranty is imposed not under state law but by the warrantor's express actions. *See id.* at 525-27. The plurality also concluded that the FCLAA does not preempt fraudulent misrepresentation claims because fraudulent misrepresentation

claims are based on a state law duty not to deceive rather than a state law duty "based on smoking and health." *See id.* at 528-29. Likewise, the plurality concluded that the FCLAA does not preempt conspiracy to defraud claims because such claims are based on a duty not to conspire to commit fraud rather than a duty "based on smoking and health." *See id.* at 530. The *Cipollone* plurality always examined the plain language of the FCLAA to determine preemption issues and never recognized a distinction between content regulations and other regulations like location regulations. The Board's argument and the Fourth Circuit's conclusion that location regulations are distinguishable from content regulations under the FCLAA are, therefore, not supported by the plurality decision in *Cipollone*.

In two recent cases, the Second and Seventh Circuits held that a ban on outdoor advertising is not preempted by the FCLAA. *See Greater New York Metro. Food Council, Inc. v. Giuliani*, No. 99-7006, 1999 WL 965691, at *6 (2d Cir. Oct. 25, 1999); *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 639 (7th Cir. 1999) ("*FAIR*"). Both of these cases draw a distinction between location and content regulations by holding that certain bans on outdoor advertising are not preempted, while finding that a tombstone requirement is preempted.[1]

Recognizing that the text of the FCLAA preemption provision does not support the artificial distinction between content and location restrictions, both decisions turn to the Congressional purpose behind the FCLAA preemption statute

[1] The tombstone provisions at issue in *Giuliani* and *FAIR* were slightly different, although both tombstone provisions were struck down on the basis that they were content restrictions imposed upon tobacco advertising. *See Giuliani*, 1999 WL 965691, at *6; *FAIR*, 189 F.3d at 640. In *Giuliani*, a tobacco advertiser could place only "a single, black and white, text-only 'tombstone' sign stating, 'TOBACCO PRODUCTS SOLD HERE'" within ten feet of an entrance to a store where tobacco products are sold. *Giuliani*, 1999 WL 965691, at *1. The tombstone provision in *FAIR* allowed only a "generic, as opposed to brand-specific, mention of a tobacco product." *FAIR*, 189 F.3d at 640.

for support. *See Giuliani*, 1999 WL 965691, at *2; *FAIR*, 189 F.3d at 637. Specifically, they recognize that the Congressional purpose behind the FCLAA preemption statute was "an effort to avoid the chaos of multiple diverse regulations" in tobacco advertising. *Giuliani*, 1999 WL 965691, at *4 (quoting *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 70 (2d Cir. 1994)); *see also FAIR*, 189 F.3d at 638. However, both decisions conclude that location restrictions do not lead to the "diverse, nonuniform, and confusing" advertising standards that Congress aimed to prevent by promulgating the FCLAA preemption statute. *See Giuliani*, 1999 WL 965691, at *4; *FAIR*, 189 F.3d at 639.

The distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 1334(b) supports the preemption of a ban on outdoor tobacco advertising. As noted in *Giuliani*, advertisers are forced to comply with diverse local zoning laws; however, this fact does not justify placing additional restrictions solely on tobacco advertisers. Rather, the failure to preempt location restrictions on tobacco advertising will place an unjustifiable burden upon a tobacco advertiser to consult local regulations concerning the placement of tobacco advertisements in every locality in which it wishes to advertise. The bans on outdoor advertising in *FAIR*, *Giuliani*, and this case present a good example of the multitude of different regulations tobacco advertisers face. The ban in *Giuliani* prevents any tobacco advertising (other than tobacco advertisements on motor vehicles) within a 1000 foot buffer zone around a school building, playground, child day care center, or youth center. *See Giuliani*, 1999 WL 682015, at *1. In contrast, the Chicago ordinance at issue in *FAIR* bans all public advertising of tobacco advertising, but carves out numerous broad exceptions including "signs located near highways, signs in certain commercial and manufacturing zoning areas, signs at certain sports facilities, signs inside a store that is licensed to sell alcohol and cigarette products, signs on commercial vehicles transporting such products, and signs iden-

tifying the premises upon which such products are sold." *FAIR*, 189 F.3d at 639. Finally, the Tacoma-Pierce County regulation in this case constitutes a complete ban on all outdoor advertising, except those advertisements that meet a tombstone exception. Thus, a tobacco advertiser is faced with diverse and nonuniform tobacco advertising regulations depending solely upon the politics of the locality of the advertising. This is precisely the result Congress was trying to avoid in promulgating § 1334(b).

The structure and history of § 1334(b) support our view that a local ban on outdoor advertising is preempted by the FCLAA. Although we recognize that there is some ambiguity in the FCLAA's legislative history, *see Cipollone*, 505 U.S. at 521, the structure and history of the FCLAA do not unambiguously support the positions taken by *Giuliani* and *FAIR*; rather, the structure and history of the FCLAA support preemption and there is no reason to depart from the plain language of § 1334(b). *See Cipollone*, 505 U.S. at 521-22 (" 'We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.' ") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *Vango Media*, 34 F.3d at 73 ("[W]e rely on an express preemption analysis in which focus remains on the language Congress used in § 1334(b).").

The statutory text of the FCLAA is the starting point for preemption analysis under § 1334. *See Cipollone*, 505 U.S. at 521-22; *see also id.* at 532 (Blackmun, J., concurring in part and dissenting in part) ("An interpreting court must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal quotation marks omitted); *id.* at 548 (Scalia, J., concurring in part and dissenting in part) ("The proper rule of construction for express preemption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning."). "[T]here is no 'good reason to believe' that Congress meant less than what it said;

indeed, in light of the narrowness of the 1965 Act, there is 'good reason to believe' that Congress meant precisely what it said in amending that Act." *Id.* at 522. The Supreme Court reiterated its emphasis on giving effect to the plain language of statutory text in a recent Medical Device Amendments (MDA) case, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). In *Medtronic*, the Court again stated that "the scope of [a] preemption statute must begin with its text . . . ." *Id.* at 484-85.

Despite the holdings of *Penn Advertising*, *FAIR*, and *Giuliani*, the text of the FCLAA's preemption provision clearly preempts a ban on outdoor advertising because such a ban constitutes a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b).

C.

The language, structure, and history of the FCLAA also support the conclusion that location regulations directed at cigarette advertising cannot be distinguished from content regulations under the FCLAA. The original 1965 preemption statute provided: "No *statement* relating to smoking and health shall be required *in the advertising* of any cigarettes . . . ." The current preemption statute provides: "No *requirement or prohibition* based on smoking and health shall be imposed under State law *with respect to the advertising or promotion* of any cigarettes . . . ."

As the plurality in *Cipollone* stated:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply 'statements' but rather 'requirements or prohibitions imposed under State law.' Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes.

Cipollone, 505 U.S. at 520. To give effect to the 1969 amendments, the distinction between content regulations and location regulations cannot now be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements. *See id.* at 519-20 ("[T]he 1965 Act only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements.").

The impact of the 1969 amendments on the FCLAA's preemptive scope is further demonstrated by an examination of the FCLAA's other preemption provision. The FCLAA's first preemption provision was not amended in 1969 and still provides that "[n]o *statement* relating to smoking and health . . . shall be required *on* any cigarette package." 15 U.S.C. § 1334(a) (emphasis added). The second preemption provision is at issue in this case and provides that "no *requirement or prohibition* based on smoking and health shall be imposed . . . *with respect* to the advertising or promotion of . . . cigarettes." 15 U.S.C. § 1334(b) (emphasis added).

In order to distinguish the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read as preempting more than just content regulations. The language used in § 1334(a) is focused on content regulations because it narrowly preempts statements related to smoking and health on cigarette packages, but the language of § 1334(b) is not focused on content because it broadly preempts requirements and prohibitions based on smoking and health with respect to advertisements. If we were to accept the Board's content-location distinction we would be forced to give "requirement or prohibition" in subsection (b) essentially the same meaning as "statement" in subsection (a), thereby ignoring the basic principle of statutory construction that different words in the same statute must be given different meanings. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a

whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.") (citing Sutherland Stat. Const. §§ 46.05, 46.06 (4th ed. 1984)). Accordingly, the language, history, and structure of § 1334(b) demonstrate, contrary to the Board's position, that the FCLAA and § 1334(b) preempt more than just regulations affecting the content of cigarette advertisements.

D.

Finally, the conclusion that the Resolution is preempted by the FCLAA advances the legislative policies that underlie the federal act. When Congress enacted the FCLAA it declared:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> . . .
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. If every board of health, city, county, and state in this country regulated the location of tobacco advertisements and prescribed certain tombstone formats for availability information signs like the Board has in this case, the purpose of the FCLAA would be frustrated because the national economy would be impeded by diverse, nonuniform, and confusing cigarette advertising regulations. The conclusion that the Resolution is preempted by the FCLAA is, therefore, not only mandated by the language of the statute but

also consistent with the legislative goals that spawned the FCLAA's enactment in 1965 and subsequent expansion in 1969.

IV.

In a final effort to save its resolution from preemption, the Board asserts two arguments that are unrelated to the language or purpose of the FCLAA. First, the Board argues that state and local governments can regulate and ban outdoor tobacco advertising under *Packer Corp. v. Utah*, 285 U.S. 105 (1932). Second, the Board argues that Congress exceeded its authority under the commerce clause when it preempted local regulation of wholly intrastate tobacco advertising. These final arguments are meritless.

Although the Court in *Packer* upheld Utah's statewide ban on outdoor tobacco advertising, *Packer* is inapplicable to this case because it pre-dates the enactment of the FCLAA and addresses issues irrelevant to this appeal. The specific issues in *Packer* were whether a statewide ban on outdoor tobacco advertisements that left print advertisements unregulated violated the equal protection clause by creating an arbitrary classification, impermissibly took advertisers' property without due process of law by limiting the freedom of contract, or constituted an impermissible state regulation of interstate commerce. *See Packer*, 285 U.S. at 109-12. *Packer* does not address or limit Congress' power to preempt local regulation of tobacco advertising or stand for the broad proposition that local governments have an inherent and undeniable right to regulate tobacco advertising. *Packer* simply instructs that in the *absence of federal regulations*, local governments can regulate tobacco advertising in general and ban outdoor tobacco advertising in particular.

The Board's argument that Congress cannot preempt local regulation of tobacco advertising that is wholly intrastate under the commerce clause is also meritless because Congress can regulate activities that are wholly intrastate if the activ-

ities have a substantial effect on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 555-56 (1995). It is beyond dispute that intrastate tobacco advertising has a substantial effect on interstate commerce because, as the Board itself recognizes, the tobacco industry spends nearly $5 billion annually on marketing campaigns. Congress was, therefore, well within its powers under the commerce clause when it enacted the FCLAA's preemption provisions.

V.

Because the Resolution is a requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes and because content regulations are indistinguishable from location regulations under the language and purpose of the FCLAA, the district court erred when it concluded that the FCLAA does not preempt the Resolution. We, therefore, reverse the district court's judgment in favor of the Board, hold that the Resolution is preempted by the FCLAA, and grant the Lindseys' motion for summary judgment on their federal preemption claim. Because the Resolution is preempted by the FCLAA, we decline to address the remaining issues raised on appeal.

REVERSED.